
(2019) 07 MP CK 0094

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2406 Of 2019

Teena Pandey & Anr.

APPELLANT

Vs

Dr. Kirnesh Pandey

RESPONDENT

Date of Decision : 08-07-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 39 Rule 1, Order 39 Rule 2, Order 26 Rule 9, Order 29 Rule 9
Indian Penal Code, 1860 — Section 498A
Code Of Criminal Procedure, 1973 — Section 125

Citation : (2019) 07 MP CK 0094

Hon'ble Judges : Vivek Rusia, J

Bench : Single Bench

Advocate : A.S. Rathore, Ajay Mishra

Final Decision : Allowed

Judgement

1. The petitioners/defendants have filed the present petition under Article 227 of the Constitution of India being aggrieved by order dated 24.01.2019

passed by Civil Judge Class-1, Indore whereby the application under Order 26 Rule 9 read with Section 151 of CPC has been allowed by directing the

parties to suggest the name of Commissioner.

2. Brief facts of the case are that the respondents being plaintiff filed the Suit against the petitioner no.1 and petitioner no.2 for the relief of declaration

and permanent injunction in respect of Plot No.387-E, Scheme No.114, Indore. Petitioner no.1 and respondent are husband and wife and matrimonial

dispute is going on between them.

3. According to the plaintiff, he purchased the suit house by registered sale deed dated 22.12.2015 in Rs.36,60,000/-. He got it registered in the name

of petitioner no.1 being his wife. She did not pay any amount at the time of sale. The plaintiffs have also obtained the loan of Rs.40,00,000/- from the

Union Bank. Thereafter, matrimonial dispute has started with defendant no.1 and she lodged a report in the Police Station under Section 498-A of

IPC. She has also filed a complaint under the Domestic Violence Act and initiated the proceeding under Section 125 of Cr.P.C. for maintenance

against him. Now, the plaintiff is alleging that defendant no.1 is raising construction over the plot contrary to the sanctioned map. Therefore, he filed

the Suit for declaration, title and permanent injunction that defendant be restrained not to raise the construction contrary to the sanctioned map.

4. The defendant no.1 filed the reply submitting that she is raising the construction as per the map. The learned trial Court has not decided the

application filed under Order 39 Rule 1-2 of the CPC so far. Before that, the plaintiff has filed an application under Order 29 Rule 9 of CPC seeking

appointment of any engineer of Municipal Corporation as a Commissioner for submitting a report after inspection of site whether the defendant no.1 is

raising the constructing contrary to the sanctioned map or not.

5. The learned trial Court vide impugned order dated 24.01.2019 has allowed the application, hence, the present petition before this Court.

6. I have heard both the parties and have gone through the record.

Discussion:

7. The provisions of Order XXVI Rule 9 of the CPC are very clear and for the ready reference the same is reproduced below :-

â??9. Commissions to make local investigations.-- 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, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net

profits, 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 :

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by

such rules.â??

8. It is clear from the above that during pendency of the trial and before the judgment if the Trial Court finds that any issue requires clarification or

elucidation, the Court may suo moto appoint Commissioner to submit the report

for which no application is required.

9. The scope of Order 26 Rule 9 of the CPC 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 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 is 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.

10. The Hon'ble Supreme Court has also considered the scope of Order XXVI Rule 9 and held that the provision of Order XXVI Rule 9 is to be

invoked if the controversy is regarding demarcation of the land between the parties.

11. The Hon'ble Supreme Court in the matter of, Haryana WAQF Board v/s Shanti Sarup and Ors., reported in (2008) 8 SCC 67,1 has held that if the

controversy is regarding demarcation of the land between the parties, the Court should direct the investigation by appointing a legal Commission. Para

4 and 5 of the aforesaid judgment is reproduced as under :-

4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the code of Civil Procedure which was rejected by the trial Court but

in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a

Local Commissioner under Order 26 Rule 9, CPC.

5. The appellate Court found that the trial Court did not take into consideration the pleadings of the parties when there was no specific denial on the

part of the respondents regarding the allegations of unauthorised possession in respect of the suit land by them as per Para 3 of the plaint. But the only

controversy between the parties was regarding demarcation of the suit land because the land of the respondents was adjacent to the suit land and the

application for demarcation filed before the trial Court was wrongly rejected.

12. This Court in case of Durga Prasad v/s Parveen Foujdar, reported in (1975) MPLJ 810 has also considered the scope of Order XXVI Rule 9 and

held that the Court should order the appointment of Commission when there is a

dispute of encroachment. Para 25 of the said judgment is reproduced as under :

â??25. Point No.2: In cases where there is a dispute as to encroachment, the fact whether there is such an encroachment or not cannot be determined in the absence of an agreed map, except by the appointment of a Commissioner under Order 26, Rule 9 of the Code of Civil Procedure. On 15.09.1966 the plaintiff, accordingly, applied for the issue of a commission to the Director of Land Records for a theodolite survey of the plaintiff's leasehold area.â??

13. Again this Court has taken similar view in case of Jaswant S/o Kashi Ram Yadav v/s Deen Dayal, reported in (2011) 2 MPLJ 576 has held that duties of the Court to issue a commission by appointing an employee of revenue department to get the land in dispute demarcated and for which no application is required. Para 10 of the said judgment is reproduced as under :-

â??10. The moot question to be decided in this appeal is whether the property in question is of plaintiff or defendant. Both the parties are claiming ownership right on it. According to the plaintiff he purchased the land vide registered sale deed Ext-P-2 from Deen Dayal and the suit property is a piece of that land but according to the defendant it is part of the property which he purchased from Sudhir Shrivastava vide registered sale deed Ext-

D-3. According to me, when there is dispute about demarcation of the property in question and its identity and both the parties are claiming it to be of their own on the basis of their document of title it was incumbent upon the Court itself to issue a commission by appointing an employee of revenue

department not below the rank of Revenue Inspector to get it demarcated so that it can be identified. In the instant case my attention has been drawn

by learned counsel for defendants to the application filed under Order XXVI, Rule 9, Civil Procedure Code but the same has been rejected at the time

of the consideration of temporary injunction application. To me learned trial Court erred in substantial error of law in rejecting the said application. The

learned First Appellate Court has also committed the same error by not allowing the said application. Indeed, it was the duty of the Court itself to issue

commission by appointing an employee of Revenue Department not below the rank of Revenue Inspector to get the land in dispute demarcated and

for its identification no application is required for that purpose.â??

14. In view of the law laid down in the above judgments, the commission can be appointed only in case of demarcation and encroachment. The issue of possession is to be decided only on the basis of evidence.

15. In the present case, the plaintiff is alleging that defendant no.1 is raising construction contrary to the sanctioned map. No such material has been produced in support of his submissions. It is settled law that the plaintiff is required to prove his case by giving evidence. He can not invoke the provisions of Order 26 Rule 9 of the CPC for collection of evidence. He has filed an application under the Provisions of Order 26 Rule 9 of CPC seeking report to the effect that the defendant no.1 is raising construction as per the map or not. This allegation is liable to be proved by the plaintiff by way of evidence. This is nothing but misuse of Order 26 Rule 9 of CPC which is not permissible in law. The trial Court has wrongly allowed the application, therefore, the petition stands allowed and the impugned order dated 24.01.2019 passed by the trial Court, is set aside hereby.

Cc as per rules. No order as to cost.