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**HIGH COURT OF CHHATTISGARH, BILASPUR****Writ Petition (227) No. 821 of 2019**Order reserved on : 02/09/2022Order delivered on : 09/09/2022

- Phoolchand Asra S/o Late Vallabhdas Asra, aged about 71 years, R/o Gujrati Bada, Halwai Lane, Raipur, Tahsil and District Raipur (C.G.)

---- **Petitioner/Plaintiff****Versus**

1. Nagar Palika Nigam Raipur, Through Commissioner, Nagar Palika Nigam, Head Office Gandhi Chowk, Raipur, Tahsil and District Raipur (C.G.) **(Defendant No.1)**
2. Zone Commissioner, Zone No.7, Nagar Palika Nigam Raipur, Office – Opposite Head Post Office, Malviya Road, Raipur, Tahsil and District Raipur (C.G.) **(Defendant No.2)**
3. Meetha Lal Gadiya, S/o Late Anraj Gadiya, aged about 75 years, R/o House No. 128, Swami Vivekanand Ward No. 57, Halwai Lane, Raipur, Tahsil and District Raipur (C.G.) **(Defendant No.3)**

---- **Respondent**

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For Petitioner	:	Mr. Sharad Mishra, Advocate
For Respondents 1 & 2	:	Mr. Pankaj Agrawal, Advocate
For Respondent No.3	:	Mr. Rishikant Mahobia, Advocate

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**Hon'ble Shri Justice Rakesh Mohan Pandey**  
**C.A.V. Order**

1. Heard.
2. The petitioner/plaintiff has filed the instant petition against the order dated 18.10.2019 passed by 10<sup>th</sup> Additional District Judge, Raipur, in Civil Suit No. 104-A/2016, whereby application moved under Order 26 Rule 9 read with Section 151 of C.P.C. has been rejected by the learned trial Court.
3. The petitioner/plaintiff filed a Civil Suit against the respondents/defendants seeking a relief of mandatory injunction that respondent/defendants no. 1 and 2 be directed to remove the encroachment of respondent/defendants no. 3 who has encroached over a drainage path situated at Gujrati Bada Halwai Lane, Raipur on the ground that such encroachment causes



obstruction in the smooth flow of the drainage water.

4. Written statement was filed by respondents 1 and 2 wherein it is specifically stated that the burden of proof of encroachment is upon the petitioner/plaintiff and encroachment can be removed if the court passes an order in this regard. Respondent No. 3 also filed its written statement and stated that there is no encroachment, he has not encroached upon any public street or drainage path and the drainage system is flowing without any obstruction. Drainage is a drainage path and 12 inches pipe was inserted in pursuance of compromise arrived at between the parties in Civil Suit No. 57-A/201 and thus, the suit filed by the plaintiff is liable to be dismissed.
5. After filing of the written statements by the respondents, the petitioner filed an application under Order 26 Rule 9 read with Section 151 of C.P.C. for appointment of Commissioner on the ground that respondent No.3 has not removed the encroachment and even respondents 1 and 2 have not taken any action in this regard. The petitioner further stated that respondent No.3 has encroached over the drainage as well as its path and flow of drainage water has come to a grinding halt. Therefore, it is necessary to conduct a spot inspection to ascertain the correct position. Respondents 1 to 3 filed their separate reply and submitted that there is no need of appointment of Commissioner as there is no encroachment.
6. The learned trial Court vide order dated 18.10.2019 held that the case was listed for plaintiff's evidence on 21.08.2017, whereas application under Order 26 Rule 9 read with Section 151 C.P.C. has been moved on 20.09.2019 for appointment of Commissioner. The learned trial Court further held that the plaintiff has to prove its case and he cannot collect the evidence through the court and thus rejected the application with a cost of Rs.2,000/-. The petitioner/plaintiff has filed the instant petition against the rejection of the application under Order 26 Rule 9 of C.P.C.
7. Learned counsel for the petitioner/plaintiff submits that the learned trial Court





has committed illegality in rejecting the application on the ground that the same has been filed after two years and the plaintiff cannot collect the material through the court.

8. On the other hand, learned counsel for respondent no. 1 and 2 and learned counsel for respondent No. 3 would submit that the learned trial Court has passed the reasoned order as there is no material to establish that respondent No.3 has encroached over the drainage path.
9. Section 75 of C.P.C deals with power of court to issue a commission and same is reproduced herein below:-

**“75. Power of court to issue commissions** – Subject to such conditions and limitations as may be prescribed, the court may issue a commission -

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition;
- [53] [(e) to hold a scientific, technical, or expert investigation;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- (g) to perform any ministerial act] ”

The court has been given power to issue a commission subject to such conditions and limitation to make a local investigation along with others. The Order 26 Rule 9 of C.P.C which particularly deals with commission to make local investigation is reproduced herein below:-

**“Rule 9. Commissions to make local investigation.**

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 marked 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





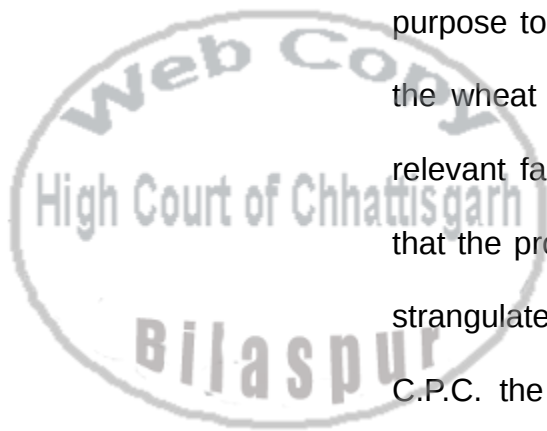
thereon the Court:

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.”

10. Under Order 26 Rule 9 of C.P.C., the court itself can exercise the power or in order to elucidate the disputed fact, and on the question of encroachment and location/identification of land on an application filed by the parties. More so when there is no agreed map between the parties, the Municipal Corporation or Municipal Council or Panchayat can enter into dispute and decide the same by placing correct position of the parties. A plain reading of the provision says that the power can be exercised at any stage. Basic purpose to exercise power under Order 26 Rule 9 of C.P.C. is to separate the wheat from chaff and in cases where it is necessary to elucidate the relevant facts, the Court can exercise its powers. It must be remembered that the procedural law is made to advance the cause of justice and not to strangle the litigant on hyper technical grounds. In Order 26 Rule 9 of C.P.C. the word used is - “elucidate” and its meaning as per *Websters Dictionary* is “to make light or clear, to explain, to remove obscurity from and render intelligible, to illustrate.” According to *Chambers Dictionary*, “elucidate” means to make lucid or clear or to throw light upon, to illustrate, making clear, explanatory.

11. In case of ***Mahendranath Parida Vs. Purnanandra Parida and others, AIR 1988 Ori 248***, the High Court of Orissa has held as under:-

“Where the controversy between the parties is the area of the land or identification or location of an object or the land, local investigation is necessary, essential, requisite or proper. It will not be a sound exercise of discretion without anything more to decline to appoint a commissioner. Very often decision of a case turns on the identification or determination of the area and evidence in relation thereto from its peculiar nature can only be had on the spot. (See *Amulya Kumar Samaddar v. Ananda*





*Charan Das*, AIR 1933 Cal 475 and in *P. Moosa Kutty*, AIR 1953 Mad 717). In such respect thereof can be laid by engaging a person qualified to conduct the investigation and measurement privately. But there are some difficulties. While doing the survey, the person has to take measurements from various points. In course of such investigation it may be necessary for him to enter upon land and premises of the other party and he may be resisted by the latter, whereas neither of the parties can resist the commissioner appointed by the Court from carrying out the writ, I am, therefore, of the view that where local investigation is considered necessary/Court should not ordinarily refuse to appoint a commissioner for the purpose of elucidating any matter in dispute between the parties.”

12. In ***Haryana Waqf Board Vs. Shanti Sarup and Others, (2008) 8 SCC 671,***

the Hon'ble Supreme Court has observed in para-6 as under:-

“6. It is also not in dispute that even before the appellate court, the appellant Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.”

13. In ***Anurag Jaiswal Vs. Collector, Khandwa and others, 2019 (2) M.P.L.J.***

**637**, it has been held in paras 12 & 13 as under:-

“12. In the considered opinion of this Court, ' for the purpose of elucidating facts in respect of any matter in dispute' means where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, to make it clear, intelligible and 'to throw light upon the matter in issue', means the main dispute as well as the facts leading to the dispute. This course may be adopted after the examination of the party or parties of *suo motu*. [See also:





*1996 SCC Online Mad 17, Nagarajan vs. Madhanakumar*].

**13.** The Bombay High Court has consistently taken the view that in cases of boundary dispute and dispute *about the identity of land, Courts should order local investigation under Order 26, Rule 9 of Civil Procedure Code.* [See: (2004) 3 Mh.L.J. 724, *Sukhdeo Parashramji Bhugul (Dr.) vs. Wamanrao Nagorao Charhat*; (2009) 6 AIR Bom R (NOC 1033) 329, *Girish Vasant Rao Bhoyar vs. Nimbaji Warluji Bambal*; (2010) 4 AIR Bom R (NOC 450) 127, *Yeshwant Bhaduji Ghuse vs. Vithabaji Laxman Ladekar*, (2014) 1 AIR Bom R 16 = AIR 2014 (NOC 173) 59, *Malhar vs. Shivaji and* (2015) 4 AIR Bom R (NOC 3) 2, *Shyam Janardam Chaoudary vs. Asha Ramdas Katkar*]. Alok Aradhe, J, in 2012 (III) MPWN 62, *Beejanwala Talukdar (Smt.) vs. Radhakrishna Rai*] opined as under:

“6. The appellant in the plaint has stated that defendant Nos. 1 and 2 have taken possession of the land belonging to him which has been marked with letters A, B, C, D which forms part of Khasra No. 32. On the other hand, defendants Nos. 1 and 2 in the written statement have denied the factum of encroachment and have stated that they are in possession of the land which has been purchased by the defendant No.2 on 20-1-1976 which forms part of Khasra No. 32. There is no agreed map. In absence of any agreed map, the trial Court could not have decided the issue of encroachment. [See : *Haryana Waqf Board vs. Shanti Sarup*, (2008) 8 SCC 671 and decision of Division Bench of this Court in the case of *Durga Prasad vs. Parveen Foujdar* 1975 M.P.L.J. 801]. For the aforementioned reasons, the substantial question of law framed by this Court is answered in negative and in favour of the appellant.”  
(Emphasis Supplied)”

14. Now coming to the facts of the present case, there is dispute regarding flow of drainage water. According to the petitioner/plaintiff, there is an encroachment over the drainage and which causes obstruction in the





smooth flowing of drainage water, whereas respondent No.3 has stated that there is no encroachment and due to garbage/polythene, papers, waste materials, drainage is blocked. In view of the disputed facts which in my opinion cannot be ascertained without local inspection or without making local investigation and further considering the judgments passed by the various High Courts and the Hon'ble Supreme Court, the learned trial Court ought to have allowed the application moved by the plaintiff/petitioner under Order 26 Rule 9 of C.P.C.

15. On the anvil of the above interpretation, the petition filed by the petitioner/plaintiff is allowed and the order dated 18.10.2019 passed by the 10<sup>th</sup> Additional District Judge, Raipur in Civil Suit No. 104-A/2016 is set aside. The trial Court is directed to decide the application filed by the petitioner/plaintiff under Order 26 Rule 9 read with Section 151 of C.P.C. afresh in light of the observations made hereinabove. No order as to cost(s).

Sd/-

**(Rakesh Mohan Pandey)**  
Judge

