

**(2017) 03 MP CK 0037**  
**MADHYA PRADESH HIGH COURT**  
**Case No:** 1030 of 2017

Sandhya Devi & Anr.

APPELLANT

Vs

Ratanchand & Ors.

RESPONDENT

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**Date of Decision:** March 17, 2017

**Acts Referred:**

- Constitution of India, Article 227 - Power of superintendence over all courts by the High Court
- Code of Civil Procedure, 1908, Order 26 Rule 9

**Hon'ble Judges:** S.A. Dharmadhikari

**Bench:** Single Bench

**Advocate:** Raja Sharma

**Final Decision:** Dismissed

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**Judgement**

1. Heard on the question of admission and interim relief.

2. By filing this petition under Article 227 of Constitution of India, the petitioners have challenged the order dated 12/01/2017 passed by Civil Judge, Class-I, Ganjbasoda, District Vidisha in case No. 124-A/2014, whereby, the application under Order 26 Rule 9 of CPC for appointment of the Commissioner has been allowed.

3. Brief facts of the case are that the respondent/plaintiff has filed a suit for removal of the encroachment and permanent injunction to the effect that plaintiff purchased the land from the predecessor of the defendants No. 2 & 3 vide sale deed dated 04/11/1999 admeasuring area 0.711 hectare. The dispute is with regard to open space on the east side in the shape of path way. It is stated that the respondent/plaintiff has raised the construction after getting permission from the concerned authority and the said open space of 15 feet width is being utilized by the

respondent/plaintiff for ingress and egress. The petitioners/defendants in collusion with the defendants No. 1 & 2 covered the said open space and raised the construction after selling the same to the petitioners. On the basis of this, an application was moved under Order 26 Rule 9 of CPC praying that the encroachment be removed.

4. The said application was opposed by the petitioners/defendants by filing a reply denying the existence of the said open space and, therefore, the same can be determined on the basis of evidence led by the parties and not on the basis of appointing a Commissioner. By making such prayer, the respondent/plaintiff is trying to collect the evidence which cannot be permitted. The trial court has erred in allowing the application, therefore, the same is liable to be set aside. Learned counsel for the petitioners in support of his contention has placed reliance on the judgments reported in 2006 (5) MPHT 346 (Suryabhan Singh vs. State of M.P. & Ors.) & 2016 (4) MPLJ 210 (Ashok Parwat vs. Sudarshan and Ors.).

5. Considering the arguments of both the parties, the learned court below came to the conclusion that the plaintiff has pleaded in the plaint that the defendant Nos. 1 & 2 and Tayyab Khan son of deceased Ganni Khan executed a sale deed dated 04/11/1999 of land bearing survey No. 18/1 admeasuring area 20x60 feet. There is an open space of 15 feet on the east side of the plot in the shape of path way. The house has been constructed after getting due permission from the Municipality. The plaint allegation is that the defendants No. 3 & 4 have encroached upon this path way in collusion with the defendants No. 1 & 2 with an object of not allowing the respondent/plaintiff to use the path way.

6. From the above, it can be clearly seen that the dispute is with regard to the encroachment of the property and when the property claimed by the plaintiff is his own property, in such circumstances, Commission should be appointed. This Court has consistently taken a view that appointment of the Commission is discretion of the court below depending upon the facts and circumstances of the case. In this case, identification of the land is in dispute which is to be ascertained by appointment of a Commission. The learned Court below while exercising the discretion cannot be said to have committed error by allowing the application under Order 26 Rule 9 of CPC. The judgments relied by the petitioners delivered in the cases of Suryabhan Singh (supra) and Ashok Parwat (supra) are distinguishable in the facts and circumstances of this case, therefore, have no applicability.

7. Considering Rule 9 of Order 26 of CPC, the language itself is in equivocal terms as it states that 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 report thereon to the Court. Since the nature of the relief is purely discretionary and also looking to the fact that description of the property given in the application, there appears to be encroachment, therefore, the court below has not committed

any jurisdictional error in allowing the application under Order 26 Rule 9 of CPC so as to warrant interference in the matter.

8. Accordingly, this writ petition is dismissed at admission stage itself.

No order as to costs.