

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

FAO No. 32 of 2022

Reserved on: 3.3.2025

Date of decision: 16.6.2025

Judhya Devi (since Deceased) & Another.Appellant.

Versus

Naresh Kumar.Respondent.

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes.

For the Appellant : Mr.Atharv Sharma, Advocate.

For the Respondent: Mr.Dinesh Chauhan, Advocate.

Vivek Singh Thakur, Judge

Appellant/defendant Nikka Ram has approached this Court under Order 43 Rule 1(u) of the Code of Civil Procedure (for short 'CPC') to assail judgment dated 21.12.2021 passed in Civil Appeal No. 10/13 of 2021, titled as Naresh Kumar Vs. Judhya Devi and Another, by District Judge, Bilaspur, H.P., whereby appeal preferred by respondent/plaintiff Naresh Kumar has been allowed and case has been remanded to the Trial Court to appoint a Local Commissioner as the application under Order 26 Rule 9 CPC filed by plaintiff in Civil Appeal, preferred before

¹***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

District Judge has been allowed and Trial Court has been further directed to decide the suit in the light of new demarcation report.

2. Plaintiff Naresh Kumar had filed a suit for permanent prohibitory injunction against defendants No. 1 and 2 Judhya Devi and Nikka Ram for restraining them from causing any interference in the suit land comprised in Khata Khatauni No. 369/389 min Khasra No. 49, situated in Village Deoli, Pargana and Tehsil Sadar, District Bilaspur, H.P. in any manner by raising construction, digging the suit land, changing the nature of the suit land, throwing raw material on the suit land either themselves or through their agents, servants and employees etc. In alternative, prayer was made that in case during pendency of the suit, if defendants dispossess the plaintiff, then a decree for vacant possession of suit land after dismantling the structure (pillars) if raised thereon and restoring the suit land to its original nature, be passed.

3. After completion of pleadings, following issues were framed:-

- “1. Whether the plaintiff is entitled for permanent prohibitory injunction as prayed?OPP
2. In alternative, whether the plaintiff is entitled for possession in case defendants succeed in raising construction over the suit land during the pendency of the suit?OPP.
3. Whether the suit of the plaintiff is not maintainable?OPP
4. Whether the plaintiff has no cause of action?OPD

5. Whether the plaintiff has not approached the Court with clean hand and suppressed the material facts from the Court?
....OPD
6. Whether the plaintiff is estopped from filing the present suit?
....OPD
7. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? ...OPD
8. Whether the suit is bad for non-joinder of necessary parties? ...OPD
9. Relief.”

4. After considering the pleadings and evidence lead by the parties, suit was partly decreed by deciding issue No. 1 in favour of plaintiff and issue No. 2 against the plaintiff. Accordingly defendants were restrained by giving following relief to the plaintiff:-

“35. In view of my findings on issue No. 1 to 8, supra, the suit filed by the plaintiff is partly decreed and defendants are restrained from changing the nature and raising construction in any manner in and over the suit land comprised in Khata/Khatoni 369/389min, Khasra No. 49, situated at Village Deoli, Pargana and Tehsil Sadar, District Bilaspur, H.P. In the facts and circumstances of the case the parties are left to bear their own cost(s). Decree sheet be prepared accordingly. Case file after competition be consigned to record room.”

5. Prayer in alternative to pass a decree for possession was declined by holding that plaintiff had failed to prove that defendants had encroached upon the suit land during pendency of the suit.

6. It is apt to record that for proving the encroachment on the suit land during pendency of the suit, plaintiff had relied upon demarcation report Ex. PW-3/A. However, the said evidence was not

considered by the Trial Court on the ground that for conducting demarcation, Demarcating Officer had not followed the Instructions issued by the Financial Commissioner and thus encroachment by the defendants on the suit land was not proved and, therefore, decree for possession was not passed.

7. Feeling aggrieved by the aforesaid rejection of prayer for passing a decree for possession of the portion of the suit land alleged to be encroached upon by the defendants during pendency of the suit, plaintiff approached District Judge by assailing the part of the judgment and decree which was against the plaintiff.

8. At the time of filing appeal before the District Judge, an application under Order 26 Rule 9 CPC bearing No. 137-6 of 2021 was also preferred by the plaintiff to appoint Local Commissioner for demarcation of the suit land and to decide the suit afresh in light of new demarcation report as well as other evidence on record.

9. District Judge found no fault with the findings returned by the Trial Court, however allowed the application for appointment of Local Commissioner and remanded the matter to the Trial Court to decide afresh in light of new demarcation report and evidence of the parties which were already on record.

10. Feeling aggrieved by the aforesaid judgment and decree passed by the District Judge, defendant Nikka Ram has filed present appeal.

11 On the basis of memo of parties of the Trial Court in First Appellate Court's judgment, Judhya Devi was arrayed as appellant No. 1, though mentioning her as deceased because she had expired during pendency of suit on 7.5.2016.

12. A ground was also taken in the appeal that as Judhya Devi, appellant No. 1 had expired on 7.5.2016 during pendency of the suit, therefore, judgment passed by the Trial Court as well as First Appellate Court was nullity for having passed against a dead person.

13. The aforesaid plea is not only misconceived, but false, as perusal of Trial Court record clearly depicts that after death of Judhya Devi, an application was moved by plaintiff on 3.1.2017 for deletion of her name on the ground that suit preferred for permanent prohibitory injunction against Judhya Devi on account of her death, had become infructuous. The said application was listed for filing reply on behalf of defendant on 17.3.2017, 17.7.2017 and 7.0.2017. On 7.9.2017, it was stated that reply to this application was not intended to be filed, and the Trial Court, thereafter, had allowed the application and name of Judhya Devi was deleted.

14. However, it appears from the record that neither amended memo of parties was filed nor necessary correction was carried out by the Trial Court in the memo of parties in its record, and this mistake in the memo of parties continued even in the proceedings before District Judge, though, it was mentioned in the memo of parties of the judgment passed by the District Judge that respondent No. 1 was deleted.

15. In aforesaid facts and circumstances, it is apparent that plea that impugned judgment and decree have been passed against dead person, is patently wrong and hence rejected.

16. Another ground advanced to assail the impugned judgment and decree on behalf of appellant is that previous demarcation report Ex. PW-3/A was not set aside and thus it was very much in existence and, therefore, appointment of second Local Commissioner to demarcate the suit land is contrary to the settled law of land. Further that appointment of Local Commissioner cannot be made a tool to create evidence in favour of either party and lastly that wholesale remand is not permissible and District Judge should have remanded the matter for appointment of Local Commissioner only, and should have decided the appeal on the basis of report of Local Commissioner itself by giving chance to the parties to prove and dispute the same in accordance with law.

17. Learned counsel for the appellant has placed reliance on judgment passed in **CMPMO No. 208 of 2019**, decided on 19.7.2019,

titled as ***Naseeb Deen and another Vs. Harnek Singh; CMPMO No. 463 of 2020***, decided on 14th August, 2023, titled as ***Om Prakash & Another Vs. Duni Chand & others; FAO No. 241 of 2022***, decided on 11.9.2023, titled as ***Smt. Rodi Devi Vs. Sh. Ganga Ram @ Rangji and others: Prem Kumar and others Vs. Parkash Chand and others, 2002 (3) Shim. L.C. 358*** (para 8); and ***Liaquat Ali Vs. Amir Mohammad & others, Latest HLJ 2016 (HP) 831*** (paras 4 to 6).

18. Learned counsel for the respondent has supported the impugned order passed by the District Judge with submission that present lis involves boundary dispute between the parties which can be settled with appropriate valid demarcation and as one demarcation report relied by the plaintiff has been discarded for technical reasons, it was incumbent upon the Trial Court to appoint Local Commissioner to conduct demarcation of the land afresh and to decide the matter thereafter. He has submitted that boundary dispute between the parties can only be resolved by way of local and proper demarcation, and, therefore, learned District Judge has rightly allowed the application filed by the plaintiff for appointment of Local Commissioner to conduct demarcation afresh in accordance with law.

19. Learned counsel for the respondent has placed reliance upon judgment passed by the Supreme Court in ***Ram Lal & others Vs.***

Salig Ram and others, (2020) 11 SCC 590 = AIR 2019 SC 729 = (2019) 2 Civil Court Cases 465 (SC) = 2019 (2) Him. LR (SC) 852.

20. In ***Prem Kumar's*** case, relied upon on behalf of appellant, Additional District Judge had remanded the case to the Trial Court for fresh disposal with direction to decide afresh after framing material and essential issues as may be arising out of pleadings of the parties and after affording two opportunities each to the appellant and respondent to produce further evidence, as may be desired. The judgment was interfered with by the High Court with the observation that Appellate Court ought to have framed additional issues and thereafter ought to have issued necessary directions to the Trial Court, and therefore, order passed by the First Appellate Court was set aside and First Appellate Court was directed to pass an appropriate order after framing necessary issues by making necessary directions to the Trial Court. This judgment is not relevant in present case. In present case already issue No. 2 has been framed and plaintiff has placed on record one demarcation report Ex. PW-3/A and thus there was no necessity to frame additional issue(s).

21. In ***Liaquat Ali's*** case, relied by counsel for appellant, prayer for appointment of Local Commissioner was not favoured by the Court on the ground that appointment of Local Commissioner to collect evidence was impermissible. In this case also evidence had been lead by the parties and there was no demarcation report on the record and the

application was filed after leading evidence by the parties, and in the given facts and circumstances, it was considered by the Court that object of local investigation was not to collect evidence. Whereas in present case, plaintiff has proved the demarcation report Ex. PW-3/A on record, which has been discarded by the Trial Court as well as First Appellate Court on technical ground and this judgment is also of no help to the appellant.

22. In **Naseeb Deen's** case order passed by the Trial Court to appoint Local Commissioner for demarcation was set aside by the Court on the ground that it was not duty of the Court to collect evidence for the party and the onus was upon the party to prove its case. In present case, as already observed, demarcation report Ex. PW-3/A, conducted by the competent authority, has been placed on record, but has been rejected for technical reasons and thus this judgment is also of no help to the appellant.

23. In **Om Prakash's** case, it was observed by the Court that demarcation is quasi judicial function under Section 107 of the H.P. Land Revenue Act and unless the demarcation order, once passed in accordance with the provisions of Land Revenue Act, is not set aside or there are allegations of encroachment or change of boundaries after previous demarcation, the fresh demarcation is not permissible. In present case demarcation report was not relied upon by the Trial Court

and it has been set aside by the First Appellate Court and as such there is no demarcation report in existence and in such eventuality, there is no bar, rather there is requirement to appoint Local Commissioner to demarcate the boundaries of the suit land afresh to resolve the dispute of boundaries.

24. In **Rodi Devi's** case, co-ordinate Bench had observed that First Appellate Court, instead of remanding the case to the Trial Court as a whole, ought to have remanded the case to limited extent to appoint fresh Local Commissioner to verify the actual position on the spot, as Trial Court had not taken into consideration the demarcation report placed on record, on the ground that same was not in accordance with law. In present case, suit of the plaintiff has been decreed partly and the said decree has not been assailed by defendant. The First Appellate Court was approached by the plaintiff against rejection of prayer for passing judgment and decree for possession in case of encroachment of suit land by defendant during pendency of suit. First Appellate Court has not set aside the judgment and decree passed by the Court, but has remanded the matter with respect to prayer of plaintiff regarding passing of judgment and decree of possession in his favour as demarcation was required to be conducted for resolving serious boundary dispute. Therefore, this judgment on facts is not applicable in present matter.

25. In judgment passed by this High Court in ***Bali Ram Vs. Mela Ram and another***, reported in ***2002(3) Shim. L.C. 131=AIR 2003 HP 87***, relying upon earlier pronouncement of this Court in ***Braham Datt Vs. Prem Chand and others, 2000 (1) SLJ 431***, it has been observed as under:-

"13. Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case.

14. In *Braham Datt v. Prem Chand*, (2000 (1) SLJ 431), this Court held as under :--

"14. Be it stated that whatever was within the power of the plaintiff to show that a piece of land owned by him has been encroached upon by the defendants, has been done by him. If the revenue agency has prepared a report which may not be according to rules, the case of the plaintiff could not have been thrown out simply for the lapses committed by the revenue agency/Tehsildar in carrying out the demarcation.

No amount of oral evidence which could be led by the plaintiff, would have established the identity of the encroached land. To identify it the only way was to get it demarcated. The plaintiff adopted that course and nothing more could have been done by him. In case the appellate Court entertained any doubt about the correctness of the demarcation and the report, the prayer of the plaintiff for appointment of Local Commissioner for demarcation of the suit land to find out the extent of the encroachment, if any, ought to have been acceded. It is the duty of the Courts to ensure that substantial justice is delivered to the parties and that for the mistake of any Government agency in demarcating the land, a party should not be deprived of the justice on merits by taking recourse to technicalities. 15. Once the learned District Judge had entertained doubt about the correctness of the demarcation given by the Tehsildar, he ought to have appointed a Local Commissioner to demarcate the disputed area to find out whether there was any encroachment and if so, to what extent, instead of proceeding to dismiss the suit. The impugned judgment and decree, therefore, cannot be sustained."

15. In the case in hand, as already stated, the preparation of the Tatima correctly was not within the powers of the parties and they did whatever was possible on their part. Therefore, after coming to the conclusion that a part of the suit land is in possession of the plaintiff and the defendant is interfering with his possession, it is necessary for fair and just decision of the case to ascertain the actual position of the spot which can be best ascertained by issue of a commission at the cost of the parties."

26. This High Court in judgment passed in ***Prithi Singh Vs. Bakshi Ram and another***, reported in ***Latest HLJ 2006 (HP) 5***, has observed as under:-

"7. As referred to above, the dispute between the parties was in fact a boundary dispute. It could be solved only by demarcation, inasmuch as the land claimed by the plaintiff to be owned and possessed by him as different from the land claimed by the defendants to be owned and possessed by them and both the lands were adjoining each other. In such a situation, the only course open for the trial Court was to have appointed a Local Commissioner to visit the spot after issuing notice to both the parties and to demarcate the suit land in accordance with law. Instead of ordering the appointment of the Local Commissioner to demarcate the suit land, the learned trial Court proceeded to dismiss the application of the plaintiff under Order 26 Rule 9 CPC by taking the plea that the object of local investigation was not to collect evidence on behalf of the parties. In my opinion, appointment of a Local Commissioner to demarcate the suit land, in a case which involves boundary dispute would not amount to collecting on behalf of either party. On the other hand, as referred to above, this would be the only course open to the trial Court to settle the dispute between the parties by appointing a Local Commissioner to visit the spot and to submit his report after demarcation in accordance with law."

27. This High Court in judgment passed in **Smt. Daya Sharma and another Vs. Suraj Mani**, reported in **2011 (2) Shim. LC 42**, had upheld the order passed by learned District Judge, allowing the application under Order 26 Rule 9 CPC for appointment of Local Commissioner to demarcate the land, on the ground that Local Commissioner should have been appointed to find out the extent of encroachment, if any.

28. Learned counsel for the appellant has placed reliance on pronouncement of the Supreme Court in **Ram Lal & others Vs. Salig Ram and others**, (2020) 11 SCC 590 = AIR 2019 SC 729 = (2019) 2

Civil Court Cases 465 (SC) = 2019 (2) Him. LR (SC) 852, wherein dismissal of Regular Second Appeal by this High Court was set aside by disposing the RSA by setting aside judgments and decrees of the Courts below, with direction to appoint fresh Local Commissioner and to reconsider and decide the suit afresh in accordance with law. Relevant paras of the said pronouncement are as under:-

"15. It appears from the observations made by the High Court in the present case that the Local Commissioner omitted to scrupulously follow the applicable instructions for carrying out such demarcation and particularly omitted to fix three reference points on different sides of the land in question. However, the report made by the Local Commissioner was accepted by the Trial Court as also by the First Appellate Court. The question is: If the Local Commissioner's report was suffering from want of compliance of the applicable instructions, what course was to be adopted by the High Court?

16. An appropriate answer to the question aforesaid is not far to seek. In the course of a civil suit, by way of incidental proceedings, the Court could issue a Commission, inter alia, for making local investigation, as per Section 75 of the Code of Civil Procedure ("the Code" hereafter). The procedure in relation to such Commission for local investigation is specified in Rules 9 and 10 of Order XXVI of the Code. Suffice it to notice for the present purpose that, as per clause (3) of Rule 10 of Order XXVI, where the Court is dissatisfied with the proceedings of such a Local Commissioner, it could direct such further inquiry to be made as considered fit. This clause (3) of Rule 10 of Order XXVI of the Code reads as under:-

"Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

17. The fact that the Local Commissioner's report, and for that matter a properly drawn up report, is requisite in the present case for the

purpose of elucidating the matter in dispute is not of any debate, for the order dated 24.01.1991 passed by the First Appellate Court having attained finality whereby, additional issues were remitted for finding on the basis of Local Commissioner's report. In the given set of facts and circumstances, we are clearly of the view that if the report of the Local Commissioner was suffering from an irregularity i.e., want of following the applicable instructions, the proper course for the High Court was either to issue a fresh commission or to remand the matter for reconsideration but the entire suit could not have been dismissed for any irregularity on the part of Local Commissioner. To put it differently, we are clearly of the view that if the Local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw, by itself, could have neither resulted in nullifying the order requiring appointment of Local Commissioner and for recording a finding after taking his report nor in dismissal of the suit. Hence, we are unable to approve the approach of High Court, where after rejecting the Commissioner's report, the High Court straightway proceeded to dismiss the suit. The plaintiffs have been asserting encroachment by the defendants on their land and have also adduced oral and documentary evidence in that regard. As noticed, the First Appellate Court had allowed the appeal and decreed the suit filed by the plaintiff not only with reference to the Commissioner's report but also with reference to the other evidence of the parties. Unfortunately, the High Court appears to have overlooked the other evidence on record.

18. In the totality of circumstances, in our view, for just and effectual determination of all the questions involved in the matter, the proper course is of issuing a fresh Commission and for direction to the Trial Court to decide the entire suit afresh on the issues as originally framed as also on the additional issues after taking the report of the Local Commissioner afresh and affording an opportunity to the parties to submit their objections, if any.

19. Accordingly, this appeal is allowed in the manner that the judgment and decree dated 06.11.2007 in RSA No. 260 of 1995 is set aside but the said appeal is disposed of by setting aside the judgment and decree of the subordinate Courts; and the suit filed by the plaintiffs-appellants is restored for reconsideration by the Trial Court keeping in view the observations and requirements foregoing.”

29. As observed supra, considering the judgments referred supra, on behalf of defendants, I find that these judgments are not applicable to present case, which have been passed in peculiar facts of those cases, whereas verdict of the Supreme Court in **Ram Lal's** case is a clear mandate which is applicable in present case.

30. As in *Ram Lal's* case suit was filed in the year 1986, wherein the matter was remitted to the Trial Court to decide it afresh in the year 2019, therefore, learned counsel for the plaintiff submits that without setting aside findings returned on the other issues, except issue No.2, the Trial Court should be directed to decide issue No. 2 afresh considering the Local Commissioner's report.

31. Similar view has been taken by this Court in judgment passed in **Santosh Kumari Vs. Mewa Singh & others**, reported in **AIR 2023 HC 152 = AIR online 2023 HP 796**.

32. Parties are litigating since long, and therefore, Local Commissioner may have been appointed by this Court, and appeal may have been adjudicated on the basis of report of Local Commissioner, however, as submitted that it will cause denial to parties to their right to

assail the report or findings returned on the basis of such report, and further that the Supreme Court has also remitted the case to the Trial Court, it would be appropriate to send the matter to the Trial Court for appointment of Local Commissioner to decide the matter thereafter in accordance with law.

33. In view of above discussion and taking into consideration the aforesaid pronouncements, especially of the Supreme Court, appeal is allowed and suit of the plaintiff is ordered to be restored for reconsideration with respect to issue No. 2 with direction to issue fresh Commission by appointing Tehsildar of the area as Local Commissioner in accordance with law as requested on behalf of plaintiff at the cost of plaintiff. Tehsildar is directed to demarcate the suit land and ascertain boundaries on or before 31.8.2025 on the basis of existing revenue record. Trial Court is directed to decide the issue No. 2 in the suit again, as originally framed, by taking into consideration fresh report of Local Commissioner.

34. Findings on other issues warrant no fresh adjudication. Entire exercise shall be undertaken by the Trial Court as expeditiously as possible, preferably within three months from the date of appearance of the parties. In case plaintiff fails to perform his part for appointment and execution of the Commission, then suit shall be dismissed for non-prosecution.

35. Parties are directed to appear before the Trial Court on 1st July, 2025.

36. Registry is directed to remit the records to the Courts below forthwith alongwith copy of this order/judgment.

The appeal stands disposed of in aforesaid terms, so also pending application(s), if any.

16th June, 2025
(Keshav)

(Vivek Singh Thakur),
Judge.