

IN THE HIGH COURT OF JHARKHAND AT RANCHI

C.M.P. No.271 of 2023

.....

Krishna Mistry @ Krishna Vishwakarma, Son of Nankeshwar Mistray, aged about 55 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar. Petitioner

Versus

1. Baidyanath Prasad Yadav, Son of late Bhim Mahato, aged about 61 years, Resident of Village Tharhi Dulampur, Ward No. 35, PO & PS Deoghar, District Deoghar.
2. Bishwanath Yadav, Son of late Bhim Mahato, aged about 50 years, Resident of Village Tharhi Dulampur, Ward No. 35, PO & PS Deoghar, District Deoghar.
3. Yugal Kishor Yadav, Son of late Bhim Mahato, aged about 40 years, Resident of Village Tharhi Dulampur, Ward No. 35, PO & PS Deoghar, District Deoghar.
4. Mehendra Mistry, Son of Nankeshwar Mistray, aged about 50 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.
5. Digamber Mistry, Son of Nankeshwar Mistray, aged about 53 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.
6. Umesh Mistry, Son of Nankeshwar Mistray, aged about 45 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.
7. Sanjay Mistry, Son of Nankeshwar Mistray, aged about 36 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.
8. Manjay Mistry, Son of Nankeshwar Mistray, aged about 36 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.
9. Ranjay Mistry, Son of Nankeshwar Mistray, aged about 33 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.
10. Manohar Mistry, Son of late Shib Charan Mistry, aged about 58 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District

Deoghar.

11. Ashok Mistry, Son of late Shib Charan Mistry, aged about 50 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.

12. Pappu Mistry, Son of late Shib Charan Mistry, aged about 49 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.

13. Dilip Mistry, Son of late Shib Charan Mistry, aged about 40 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.

14(a) Manoj Kumar Vishwakarma, aged about 54 years, Son of late Bishnu Mistry @ Vishnu Mistry, Resident of Ward No.20, HSH Road, near D.A.V. Public School, Castairs Town, PO, PS & District Deoghar, Jharkhand – 814112.

14(b) Jitendra Kumar Vishwakarma, aged about 39 years, Son of late Bishnu Mistry @ Vishnu Mistry, Resident of Ward No.20, HSH Road, near D.A.V. Public School, Castairs Town, PO, PS & District Deoghar, Jharkhand – 814112.

15. Shanti Devi, Wife of late Shib Charan Mistry, aged about 75 years, Resident of Mouza Khoradah, Ward No. 35, PO & PS Deoghar, District Deoghar.

.... Opp. Parties

CORAM : HON'BLE MR. JUSTICE SUBHASH CHAND

For the Petitioner	: Mr. Prashant Pallav, Advocate
	Ms. Shivani Jaluka, Advocate
For the OP	: Mr. Arvind Kr. Choudhary, Advocate

10/05.12.2024 On behalf of petitioners the learned counsel Mr. Prashant Pallav and on behalf of opposite party the learned counsel Mr. Arvind Kr. Choudhary are present.

2. By way of this instant CMP the order dated 09.02.2023 passed by the learned court of Civil Judge (Sr. Division)-III, Deoghar in MCA No.

417 of 2022 arising out of Original Suit NO. 37 of 2019 has been assailed whereby the application under Order XXVI Rule 9 of CPC filed on behalf of the plaintiff has been allowed.

3. The learned counsel for the petitioner has submitted that the Original Suit No. 37 of 2019 was filed on behalf of Baidyanath Pd. Yadav & Ors. against Krishna Mistry & Ors. with the prayer to declare the right, title, interest of the plaintiff over the land in suit and also for recovery of the possession after evicting therefrom the defendants who is illegal and unauthorized occupants. Further the relief for permanent injunction was also sought restraining the defendants claiming any inch of land of the property in suit.

4. In the plaint itself the plaintiff have pleaded in their plaint that the defendants also advanced the fraudulent order of exchange in which the plaintiff has pleaded himself that plot no. 330 Bari II with a total area of 2.29 acres and plot no.331 Bari II area 1.23 acres appertaining to jamabandi no.20 of mouza Khoradsah no. 402 are raiyati non-transferable lands recorded in the name of Mani Mahto, Gayani Mahto and Ramcharan Mahto during last Gantzer's Survey settlement. Jhatu Mahto and Premnath Mahto were full brother of plaintiffs are the descendants great-grand sons of Prem Mahto and grand sons of the recorded raiyat Ramcharan Mahto. Simultaneously the plaintiff has also pleaded that the defendants who are claiming their possession and right, title in the property in question on the basis of the exchange that is also itself illegal.

5. It has been further submitted that in that suit the written statement was filed on behalf of the defendants which is annexure no.2. In this case the evidence of plaintiff had been concluded and the evidence of defendant had commenced. At that stage application was moved on behalf of plaintiff under Order XXVI Rule 9 of CPC for appointing the survey pleader commissioner for the inspection and to report with carving of map according to the present state of plot no. 370 and 385 of Anawadi Khata No.28 of mouza Khoradah 402 (Ward No.35) of Deoghar Nagar Nigam. This application is annexure no.3 of this petition against the same objection were filed by the defendant i.e. annexure no.4.

6. The learned trial court after hearing the rival submission of the learned counsel for both the parties passed the impugned order whereby has allowed the pleader commissioner report. Thus the very order is itself based on perverse finding. No reason has been recorded why the survey commissioner was required for inspection of the property in question.

7. On behalf of respondent the learned counsel Mr. Arvind Kr. Choudhary vehemently opposed the contentions and defended the impugned order.

8. From the very perusal of the **application which is annexure no.3 filed by the plaintiff under Order XXVI Rule 9 of CPC** it is found that the plaintiff has averred that plaintiff and their family members have been purely cultivator, labourers and completely unaware of the implicacy of the law and after having played fraud and misrepresentation defendant have obtained the ab-initio, illegal and fraudulent order of exchange from the court of SDO, Deoghar. Both under the law and fact any judgment or order obtained by playing fraud or misrepresentation is illegal and void. In the interest of justice and equity both above mentioned plots were sought to be recorded as *parti* land during last gantzer's survey settlement from the correct and just appreciation of the claims of both the parties the survey commissioner was sought to be appointed.

8.1 From the very perusal of the plaint and the very perusal of the written settlement filed on behalf of defendant **there is no dispute between the parties in regard to identity of the property in question or in regard to location of the property in question since the plaintiff himself has admitted in the plaint that the property in question which is in unauthorized and illegal occupation of defendant as they have obtained in regard to the property in suit the exchange order from the concerned court by playing fraud.** In view of the above the plaintiff had sought the relief for declaration of right, title and interest in the property in question and also recovery of possession from the defendant after evicting them from the possession thereof and relief for permanent injunction is also sought.

8.2 Taking into consideration the pleadings of the plaintiff there is no requirement of appointing any survey pleader commissioner. The

plaintiff in the application which is annexure no.3 has not shown any ground on which he wants to call for the report of survey pleader commissioner. Rather it has been stated that for the correct and just appreciation of respective claim the survey commissioner is sought to be appointed. For the same legally no permission can be granted to appoint the survey commissioner. **The court cannot permit the parties to collect the evidence.**

8.3 Herein it would be pertinent to mention the provisions of **Order XXVI Rule 9 of CPC** which is reproduced hereinbelow:

“Order XXVI R. 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 therein 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.”

8.4 The Hon'ble Apex Court in case of “**Saraswathy Vrs. Viswanathan**”, reported in **2002 (2) CTC 199**, it has been held that object of appointment of Commissioner is not to collect the evidence but to elucidate the matter which are local in character and which can be done only by local investigation at spot.

8.5 The finding recorded by the learned trial court is perverse, reason being in the application itself for appointment of pleader commissioner no where the applicant has mentioned for what purpose he wants to call for the report of survey commissioner. There is no finding of the learned trial court how the survey commissioner report was necessary for the correct and just appreciation of respective claims of both the parties.

8.6 The grounds which are taken in the very application filed on behalf of the plaintiffs do not come under the purview of Order XXVI Rule 9 of CPC. There being no dispute between the parties in regard to the identity and also the location of the suit property, the impugned order by

which the learned trial court has allowed the application needs interference and this petition deserves to be allowed.

9. This petition is hereby allowed and the impugned order dated 09.02.2023 passed by the learned court of Civil Judge (Sr. Division)-III, Deoghar in MCA No. 417 of 2022 arising out of Original Suit No. 37 of 2019 is set-aside.

10. Accordingly, this petition stands disposed of.

(Subhash Chand, J.)

RKM
AFR