

**IN THE HIGH COURT OF JHARKHAND AT RANCHI  
C.M.P. No. 549 of 2024**

Kiritee Mahatha, Aged about 40 years, Son of Late  
Durgadas Mahatha, Resident of village Bandhgora,  
Tola Khedadih, P.O. and P.S. Pindrajora, District -  
Bokaro, Jharkhand.

..... ... Petitioner

Versus

1. Roshan Jamil Ansari, Son of Late Salim Ansari,  
Resident of village - Ukrid Basti, P.O. and P.S.  
Sector XII, District -Bokaro.
2. Rizwan Ansari, Son of Late Salim Ansari,  
Resident of village - Ukrid Basti, P.O. and P.S. -  
Sector XII, District – Bokaro.
3. Imran, Son of Late Salim Ansari, Resident of  
village - Ukrid Basti, P.O. and P.S. - Sector XII,  
District - Bokaro.
4. Kalimuddin Ansari, Son of Late Hazi  
Nizamuddin Ansari, Resident of village - Ukrid  
Basti, P.O. and P.S. - Sector XII, District - Bokaro.
5. Kongresh Mahatha, Son of Late Dasranjan  
Mahatha, Resident of village - Bandhgora, Tola -  
Khedadih, P.O. and P.S. Pindrajora, District -  
Bokaro.
6. Amar Mahatha, Son of Late Dasranjan Mahatha,  
Resident of village - Bandhgora, Tola Khedadih,  
P.O. and P.S. -Pindrajora, District - Bokaro.
7. Chandicharan Mahatha, Son of Late Santu,  
Resident of village Bandhgora, Tola Khedadih, P.O.  
and P.S. Pindrajora, District - Bokaro.
8. Sanjay Mahatha, Son of Yusdhistir Mahatha,  
Resident of village Bandhgora, Tola Khedadih, P.O.  
and P.S. Pindrajora, District - Bokaro.
9. Parikshit Mahatha, Son of Late Moti Lal  
Mahatha, Resident of village - Bandhgora, Tola

Khedadih, P.O. and P.S. Pindrajora, District - Bokaro.

10. Ajit Mahatha, Son of Late Moti Lal Mahatha, Resident of village Bandhgora, Tola-Khedadih, P.O. and P.S. Pindrajora, District - Bokaro.

11. Yusdhisthir Mahatha, Son of Late Moti Lal Mahatha, Resident of village - Bandhgora, Tola - Khedadih, P.O. and P.S. - Pindrajora, District - Bokaro.

12. Harsh Lal Mahatha, Son of Late Moti Lal Mahatha, Resident of village - Bandhgora, Tola Khedadih, P.O. and P.S. Pindrajora, District – Bokaro.

13. Raju Mahatha, Son of Late Bishun Mahatha, Resident of village Bandhgora, Tola Khedadih, P.O. and P.S. Pindrajora, District - Bokaro.

14. The Head of the District Record Room, Purulia, P.O. and P.S. Purulia, District - Purulia.

..... ... Opposite Parties

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**CORAM : HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI**  
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For the Petitioner : Mr. Kushal Kumar, Advocate.  
For the O.P. Nos. 1 to 3 : Mr. Mukesh Kumar, Advocate.  
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10/ 30.06.2025 Heard Mr. Kushal Kumar, learned counsel appearing for the petitioner and Mr. Mukesh Kumar, learned counsel appearing for the O.P. Nos. 1 to 3.

2. It transpires that notice upon O.P. No. 4 has been effected, however, he has chosen not to appear in the matter. Further notice upon O.P. Nos. 5 to 14 has been dispensed by order dated 13.12.2024, as they are said to be the proforma opposite parties.

3. This petition has been filed under Article 227 of the Constitution of India, wherein prayer has been made for setting aside

the order dated 14.05.2024 passed by the learned Sub-Judge-III, Bokaro, in M.C.A. Case No. 35 of 2024 arising out of Original Suit No. 10 of 2023, whereby the learned court has been pleased to allow the application of the plaintiff filed under Order-XXVI Rule-9 of the CPC for appointment of the Survey Knowing Pleader Commissioner to investigate the suit property.

4. Learned counsel appearing for the petitioner submits that there is dispute between the parties over the land admeasuring an area of 11.21 acres situated in Mauza - Bandhgora under Khata No. 10 (Now New Khata No. 127) bearing several plots where the O.P. Nos. 2 to 4 have been claiming the right, title and possession over the aforementioned land on the basis of some documents of Surrender Case No. 76/124 of 1939-40 and the plaintiffs have claimed that there was a Title Suit, being T.S. No. 119/1947-48. Based on these backgrounds, Original Suit No. 10 of 2023 has been instituted by the plaintiffs-opposite parties for a decree declaring the plaintiff has valid right, title, interest and possession over the Scheduled-A land and further for passing a decree for permanent injunction restraining the defendants to interfere and obstruct the peaceful possession of the plaintiff over the suit and if the plaintiff is dispossessed during the pendency of the suit, a decree for recovery of possession may be passed in favour of the plaintiff and also for the cost of the suit.

5. Learned counsel appearing for the petitioner submits that prior to appearance of the defendant/petitioner, the plaintiffs have made an application under Order-XXXIX Rule-1 and 2 of the CPC, which was registered as MCA NO. 16 of 2023 dated 13.03.2023 seeking an injunction over the suit property, however, subsequently,

the said petition was not pressed by the plaintiffs, which was dismissed as not pressed by the order dated 05.02.2024. He submits that after appearance of defendants on 22.03.2024, another application under Order-XXVI Rule-9 of the CPC has been filed by the plaintiffs for appointment of the survey knowing pleader commissioner, and pursuant to the impugned order has been passed, whereby, the learned court has been pleased to pass the order to appoint the survey knowing pleader commissioner to submit a report on the point mentioned in the impugned order.

6. Learned counsel appearing for the petitioner submits that by the impugned order, the evidence has been tried to be created by the plaintiffs-opposite parties herein and the trial has not yet been commenced. He submits that the onus lies upon the plaintiffs-opposite parties to prove the case by way of leading the evidence and a short cut has been tried to be maintained by way of filing the said petition under Order-XXVI Rule-9 of the CPC, which has been allowed by the learned court. He then submits that the impugned order is not on the spirit of Order-XXVI Rule-9 of the CPC. On these grounds, he submits that the impugned order is bad in law, as such, the impugned order may kindly be set aside.

7. On the other hand, learned counsel appearing for the O.P. Nos. 1 to 3 has opposed the prayer and submits that the learned court considering the dispute in nature has been pleased to pass the order for appointment of survey knowing pleader commissioner and there is no illegality in the impugned order. He draws the attention of the court to the plaint, particularly para-13 and 14 and submits that the encroachment is there for that a proceeding under Section 144

Cr.P.C. was also initiated, which was also replied in the written statement filed by the petitioner/defendant and simply denial has been made. He submits that the encroachment is there, the learned court is competent to pass such order under Order-XXVI Rule-9 CPC and there is no illegality in the impugned order, as such, this petition may kindly be dismissed.

8. It is an admitted position that the suit was instituted by the plaintiffs-opposite parties herein, wherein a petition under Order-XXXIX Rule-1 and 2 of the CPC, which was registered as MCA No. 16 of 2023, subsequently, the said petition was not pressed by the plaintiffs and the same was dismissed as not pressed by the order dated 05.02.2024. After appearance of defendants, a petition under Order-XXVI Rule-9 of the CPC has been filed, which has been allowed by the learned court and the points of inquiry have been disclosed in the said order, which are as under:-

*“(a) To investigate the suit property as described in schedule A and AA of the plaint as well as schedule of this application and to prepare maps of the same in reference to the Suit Mouza Map.*

*(b) To investigate and measure the schedule property as mentioned in schedule of the plaint and to report about the actual area, nature/class and character of the suit property.*

*(c) To report whether any construction has been made over the suit land or not?*

*(d) To report whether any construction is going on over the suit land or not ?*

*(e) If any construction is found over any*

*portion of the suit land then the measurement, nature and age of such construction.*

*(f) To take photographs of the suit land showing the construction portion only with date.*

*(g) To report about any other feature or features which will be pointed out by the Plaintiffs at the time of investigation. Described in Shedule- A and Scedule 1A of the Plaint."*

9. The dispute in question is with regard to title, possession and recovery and restraining the defendants in the main suit and by way of above points to be reported by the survey knowing pleader commissioner, prima facie it transpires that the evidence is trying to be collected by way of appointing the survey knowing pleader commissioner.

10. In terms of Order-XXVI Rule- 10 CPC, the commissioner has to submit a report in writing to the learned court. The report of the commissioner and the evidence taken by him, constitute evidence in the suit and form the part of the record. However, with the permission of the court, may examine the Commissioner personally in open court touching any of the matters of the report. The evidentiary value of any report of the commissioner is a matter to be tested in the suit. It is open to the objections including the cross objections.

11. It is further well settled that the object of local investigation by appointing commissioner is not to collect evidence which can be adduced in the court. It is the court who has to decide

the matter on the basis of the evidence to be adduced by the parties or the evidences already on record. A reference may be made to the case of *Praga Tools Corpn. Ltd. Versus Mahboobunnissa Begum*, reported in (2001) 6 SCC 238 wherein, at para-12, it has been held as under:-

*“12. The State of Andhra Pradesh has filed objections to the findings of the trial court. On behalf of the appellants and the State of Andhra Pradesh it was submitted that the trial court could not have discarded the findings of the Court Commissioner. It was submitted that as per the orders of this Court, it was only this Court which could hear objections on the report of the Commissioner. We see no substance in this submission. This Court had directed the trial court to record findings. The trial court may have appointed a Commissioner to carry out survey but ultimately the findings had to be recorded by the trial court. The report of the Commissioner could only be an aid to the trial court in arriving at its findings. The trial court has allowed parties to lead oral as well as documentary evidence. The trial court has complied with the directions of this Court.”*

12. In light of the above for the purpose of getting report from survey knowing commissioner to find out the present physical possession and the land in dispute and to find out the actual state of affairs between the parties, the appointment of survey knowing commissioner for that purpose will not bound to collect the evidence rather it will elucidate any matter in dispute. Normally writ is to be

issued to a commissioner for local investigation to appreciate the evidence already recorded. The commissioner can be appointed where it is to be found as to which plot the disputed land lies. A writ can be issued to any person to relay the same on the bench even through no evidence is required if the court finds that the parties themselves cannot produce the evidence to that effect. In the case in hand, the nature of the suit is for declaration of the right, title, interest and recovery of possession and further injunction upon the defendants not to interfere in the suit property.

13. Thus, the points determined by the learned court as indicated hereinabove, it appears that the entire facts are tried to be collected by way of appointing the survey knowing pleader commissioner, which is not on the spirit of Order-XXVI Rule-9 of the CPC that too at the initial stage of the trial, none of the parties have laid the evidence nor the issues have not been framed as yet.

14. In view of the above facts, reasons and analysis, the impugned order dated 14.05.2024 passed by the learned Sub-Judge-III, Bokaro, in M.C.A. Case No. 35 of 2024 arising out of Original Suit No. 10 of 2023, whereby the learned court has been pleased to allow the application of the plaintiff filed under Order-XXVI Rule-9 of the CPC for appointment of the Survey Knowing Pleader Commissioner to investigate the suit property, is hereby, set aside.

15. This petition is allowed and disposed of.

(Sanjay Kumar Dwivedi, J.)

*Amitesh/-*

[A.F.R.]