

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**CMPMO No. 542 of 2019****Reserved on 22.12.2025****Decided on: 29.12.2025**

Shri Sant Ram (since deceased) through his
legal representatives namely Shri Ramesh Chand
and others

... Petitioners

Versus

Smt. Urmila and another

... Respondents

Coram***Hon'ble Mr. Justice Ajay Mohan Goel, Judge.*****Whether approved for reporting?¹**

For the petitioners : Mr.Bhupinder Gupta, Senior Advocate
with Mr. Janesh Gupta, Advocate.

For the respondents : M/s Vandana Kuthiala and Diwan
Singh Negi, Advocate.

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, the petitioners have assailed order dated 28.08.2019, passed by the learned Appellate Court, in terms whereof, the application filed under Order 26, Rule 9 of the Code of Civil Procedure, has been dismissed.

2. Having heard learned Counsel for the parties and having perused the order under challenge as well as other documents appended therewith, this Court is of the considered view that there is no perversity with the order passed by the learned Trial Court. Record demonstrates that the predecessor-in-interest of the

¹ Whether reporters of the local papers may be allowed to see the judgment?

petitioners, i.e. the original plaintiff (who is now dead) filed a suit for declaration that he had a right to use the path in issue as easement of necessity upon the land which belongs to the defendants and has prayed for a decree of permanent prohibitory injunction by restraining the defendants from interfering/obstructing the use of path. According to the original plaintiff, earlier he was the owner in cultivation of the entire land but subsequently a part thereof was transferred by him in the name of defendant No. 1 and the land transferred was the front portion of the land adjacent to the road and included the path, which the original plaintiff was using to ingress the remaining part of his land. In the month of February, 2013, defendants wrongly obstructed the passage by constructing a wall over the path and this led to the filing of the suit by the original plaintiff.

3. In the application filed under Order 26, Rule 9 of the Code of Civil Procedure, it was averred that the path in issue is the only access, which connects remaining land of the original plaintiff with the National Highway and the original plaintiff was having no alternative path, except the path in issue, to enjoy his property. It was also averred therein that the defendants have denied the existence of any such path and have also denied that there was no alternative path to the remaining land of the petitioners, therefore, it

was necessary to appoint a Local Commissioner to clarify these facts.

4. Learned Trial Court has rejected the application by returning the following findings:-

“3. I have heard learned Counsel for the parties and have gone through the records carefully.

4. Plaintiff had taken a plea in the plaint that a passage is existing on the suit land which is being used by the plaintiff and after the sale of the suit land to the defendant the same is used as an easement and necessary for optimum use of remaining vacant land. The said passage is only passage available to the plaintiff. On the other hand defendants have denied the existence of any path over the suit land and the said right by way of easement and necessity of plaintiff. Therefore, it is apparent that plaintiff had taken a plea regarding the easement and easement. by way of necessity. In order to succeed, it would be essential for the plaintiff not only to show the existence of passage but also that the passage is being used by way of necessity and as easement. The plaintiff would also has to establish that the passage is being used by him prior to selling the suit land to the defendants, as a matter of right. These facts are matter of evidence. The onus was upon the plaintiff. Therefore, sending local commissioner on the spot would amount to

creation of evidence in Favour of the plaintiff and this will prejudice the defendants.

5. *Therefore, in view of the above, the present application fails and same is dismissed, which after needful be tagged with the main file and main file be put up for arguments on 18.09.2019.”*

5. This Court concurs with the findings returned by the learned Trial Court. In light of the fact that the contention of the petitioners is that there exists a path over the land which the original plaintiff sold to defendant No. 1 and they are claiming easementary right over the same and whereas defendants have denied any such path and have taken the stand that there is an alternative path which gives access to the remaining land of the petitioners, obviously, the respective contentions of the parties, more so, of the petitioners/plaintiffs have to be proved by the parties concerned by leading cogent evidence. Learned Trial Court has rightly said that it is for the plaintiff to establish before the Court that when he sold the land to defendant No. 1, there indeed was a path as claimed by him and the same was being used by him as a matter of right. This Court further concurs with the learned Trial Court that all these facts are to be proved by the plaintiff by leading cogent evidence and indeed, if a Local Commissioner is appointed to visit the spot as prayed by the plaintiff in the application, then the

same would amount to creating the evidence which is not the intent of the provisions of Order 26, Rule 9 of the Code of Civil Procedure.

6. Reliance placed by Learned Senior Counsel for the petitioners on the judgment of Hon'ble Coordinate Bench of this Court in **Ramesh Chand** vs. **Kamla Devi and others**, 2023, SCC online HP 1724, is also of no assistance to the petitioners herein, because a perusal of the said judgment demonstrates that in light of the backdrop in which the application was filed therein, Hon'ble Coordinate Bench was pleased to pass the order. This Court is of the considered view that the provisions of order 26, Rule 9 of the Code of Civil Procedure cannot be used by a party to use the Court as a tool to generate evidence because onus is upon the party which alleges to prove its case by leading cogent evidence.

Therefore, in the backdrop of above discussion, this Court finds no infirmity or perversity with the impugned order and this petition being devoid of any merit, is dismissed. Pending miscellaneous application(s), if any also stand disposed of accordingly.

(Ajay Mohan Goel)
Judge

December 29, 2025
(narender)