

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No.401 of 2026

Date of decision:17.08.2026

Devinder Kumar & others

...Petitioners

Versus

Sunder Lal & others

...Respondents

Coram:

The Hon'ble Mr. Justice Romesh Verma, Judge.

Whether approved for reporting?¹

For the petitioners : Mr. Kulbhushan Khajuria, Advocate.

For the respondents : Mr. Devender K. Sharma, Advocate.

Romesh Verma, Judge (oral):

The instant petition arises out of the order as passed by the learned Civil Judge Court No.2, Mandi, dated 13.07.2026, whereby the application filed by the respondents-plaintiffs under the provisions of Order 26 Rule 9 and under Order 39 Rule 7 CPC came to be allowed.

2. The facts, as emerge in the present case, are that the plaintiffs-respondents filed a suit for cancellation of documents, declaration, possession, permanent prohibitory injunction and mandatory injunction under the provisions of Sections 5, 31, 34 to 38 of the Specific Relief Act. As per the averments made in the plaint, it

Whether reporters of Local Papers may be allowed to see the judgment?

has been stated that the plaintiffs are the owners-in-possession of the land comprised in Khasra No. 926/663, which is under the joint passage/road of the parties, starting from the western corner of old Khasra No. 663 and goes up to the eastern corner of the Khasra number in front of the existing house of the parties and the width of the said road is 8 feet from the beginning up to the end, through which they have been taking their own vehicles.

3. As per the case as set up by the plaintiffs-respondents, the present petitioners have started obstructing the area of the path/road by planting bushes and hedges in front of their houses by the side of the road since 04.11.2025, whereby the road/path has become congested and it has become difficult to take their vehicles up to their houses from the main road. As per the plaintiffs, it is the only approach to the houses of the plaintiffs as well as the defendants and as such, they have no right to cause any obstruction in the said area of the road which is in front of the houses. Therefore, the defendants are required to be restrained from causing any interference in the said area of the path/road, which is 8 feet in width, in front of the house of the present defendants and others.

4. Further, it has been stated in the plaint that during the pendency of the suit, the present defendants/petitioners started obstructing the path on Khasra No.926/663 by stacking stones, wooden pieces and other household articles in the passage and

obstructing the vehicles of the plaintiffs in the intervening night of 30.11.2025 and 01.12.2025. Therefore, it has become very difficult for the plaintiffs to take their cars, scooters and tractors to their houses and when the petitioners/defendants were requested to remove the said obstruction, they flatly refused to do so.

5. A complaint was also made to the Station House Officer, Police Station, Balh, but the police officials did not take any action on the complaint filed by the plaintiffs. A similar complaint was made to the President of Gram Panchayat, who visited the spot on 02.12.2025, but the respondents refused to remove the said obstruction from the passage. Thereafter, another complaint was filed by the plaintiffs-respondents before the Superintendent of Police on 04.12.2025, wherein the matter was compromised between the parties.

6. As per the case as set up by the plaintiffs, earlier the land was owned by Late Shri Sawanu, son of Shri Dhana and he had four sons, i.e., plaintiff No.1, defendant No.1, Late Shri Prem Singh and Late Shri Khem Chand. He also executed a Will in favour of his four sons. According to the plaintiffs, the suit property is joint *inter se* the parties and in the year 1994, all the brothers separated and started earning their livelihood. Defendant No.1, Shri Thalia Ram, who had no sufficient funds for raising construction, wanted to take the loan and since there was no property in his name, he requested his father Sawanu to transfer 5 biswas of land out of the total suit land, as

incorporated in the plaint. Late Sawanu, after consultation with all his sons, agreed to transfer 5 biswas of land in the name of defendant No.1, Shri Thalia Ram and Late Shri Sawanu Ram out of the land of Khasra No. 738 transferred 5 biswas of land in favour of defendant No.1, Shri Thalia Ram.

7. In the suit, primarily the plaintiffs have sought the following reliefs:

(i). That the Sale Deed No-399, dated 8-3-2004 executed by Late Sh. Sawanu in favour of defendant No-1 along with Mutation No-729 dated 19-3-2004 as well as Gift Deed No-988, dated 17-6-2005 executed by Late Sh. Sawanu in favour of Late Sh. Khem Chand (predecessor-in-interest of the defendants No-2 to 5), along with Mutation No-776, dated 30-6-2005 may kindly be cancelled and the plaintiffs and defendants No-1 to 5 be declared joint owner in possession of the land transferred through above said Sale deed and Gift Deed;

ii). That if the due execution of the above said documents will be proved, though not admitted, even then the above said documents may kindly be partially cancelled and it be declared that there was no intention of Late sh. Sawanu to transfer the land in favour of defendant No-1-Thalia Ram as well as Late Sh. Khem Chand as is shown in the Tatima attached with the said documents and at the most alternatively it be declare that this transfer of land will be deemed out of the land of entire Khata/Khasra Number only for the purpose of taking loan.

iii). That the Mutation No-919, dated 15-6-2011 be also declare wrong, null and void on account of the reason that it is not attested as per to the contents and spirits of WILL Basika Summar No-39, dated 7-6-2016 executed by Late Sh. Sawanu and the defendant No-1 and Late Sh. Khem

Chand was wrongly given equal share in the entire suit land along with plaintiff No-1-Sunder Lal and Late Sh. Prem Singh (predecessor-in-interest of plaintiffs no-2 to 6).

(iv). That the decree for possession of two rooms of slate roofed double storyed house constructed by Late Sh. Prem Singh be granted in favour of the plaintiffs No-2 to 6 and against the defendants No-2 to 5 and the plaintiffs No-2 to 6 be ordered to be put in possession of the same after dispossessing the defendants No-2 to 5.

(v). That the defendants No-2 to 5 be further restrained from using the cow-shed constructed by Late Sh. Sawanu on the suit land.

be restrained to raise (vi). That the defendants No-2 to 5 any construction of cow-shed or any other structure over the vacant land existing in front of the house of plaintiff No-1 adjacent to the path/road existing on the northern boundary of old Khasra No-663, the size of which is 31" x 17" on the spot and also not to stack any other material to exhibit their possession over the same by passing a decree for Permanent, Prohibitory Injunction.

(vii). That the defendants No-2 to 5 be further restrained to cause any obstruction on the main path/road, which is existing on the northern boundary of old Kh.No-663, in front of the house of plaintiffs, and defendants, especially in the area in front of their houses, the size of which is 8 feet in width, which start from the link road adjacent to the house of defendants No-2 to 5 up to the slate roofed house of Prem Singh, by putting/planting hedges and bushes etc. or by any other way by passing a decree for Permanent, Prohibitory Injunction.

(viii). That the Mutation No-1194, dated 13-4-2023 of the inheritance of Late sh. Prem Singh be also declared wrong, null and void and plaintiff No-5-Sneh Lata be also declared owner of the property left by Late Sh. Prem Singh along with plaintiffs No-2 to 4 and 6.

(ix). And/or any other relief which this Ld. Court deems fit be awarded in favour of the plaintiffs, cost of the suit be also awarded and justice be done.”

8. The petitioners-defendants contested the suit by filing written statement wherein all the averments made in the plaint were specifically denied.

9. As fairly conceded by the learned counsel for the parties, an application under Order 39 Rules 1 and 2 CPC was filed by the respondents-plaintiffs for seeking an injunction against the present petitioners. The learned trial Court passed an order of status quo in the said application. After the passing of the order of status quo, the present respondents-plaintiffs filed another application under Order 39 Rules 1 and 2 CPC for the removal of the obstruction created by the respondents during the pendency of the present suit on the path/road existing on the suit land, by passing an order in mandatory form, as well as for the grant of police assistance to implement the order dated 01.01.2026 on behalf of the plaintiffs.

10. The said application has been duly resisted by the petitioners-defendants and is still pending before the learned trial Court. Apart from filing the application under Order 39 Rules 1 and 2 CPC for the grant of mandatory injunction, the present respondents separately filed an application under Order 26 Rule 9 of CPC read with Order 39 Rule 7 and Section 151 of CPC for the appointment of Local

Commissioner for the inspection of the suit property as well as for calling for a report of the spot on behalf of the applicants-plaintiffs.

11. As per the averments made in the application, it has been stated by the plaintiffs-respondents that defendants No.2 to 5 in their written statement and reply to the application under Order 39 Rules 1 and 2 CPC had admitted the existence of the passage, but they have denied the width as being 8 feet and alleged that the width of the same is 2 to 3 feet. It has been further stated in the application that it is a pedestrian path and vehicles/ four-wheelers cannot be taken through the said road. Therefore, in the application, it has been prayed that in order to elucidate the controversy/dispute between the parties, investigation regarding the existence of the passage/road as well as its width on the spot is necessary to be determined by appointing Local Commissioner, for which the instant application has been filed.

12. The petitioners-defendants resisted the said application on the ground that the provisions of Order 26 Rule 9 of the CPC cannot be invoked for creating evidence or for enabling a party to discharge the burden of proof cast upon it. It has been stated in the reply that all the averments made therein are false, incorrect, unproved and manipulated and that the instant application has been filed in order to create evidence in favour of the plaintiff.

13. The learned trial Court, vide its impugned order dated 13.07.2026, allowed the application by appointing Shri Nishant

Sharma, Advocate, as Local Commissioner, who was directed to visit the spot and report about the factual position of the spot by way of a rough spot map.

14. Feeling dissatisfied, the petitioners-defendants have approached this Court assailing the said order passed by the learned trial Court.

15. It is contended by Mr.Kulbhushan Khajuria, learned counsel for the petitioners-defendants, that the impugned order as passed by the learned trial Court is a non-speaking order and the averments and counter-averments as made by the respective parties have not been taken into consideration by the learned trial Court. Without appreciating the point in controversy, the application has been allowed, which virtually amounts to decreeing the suit of the plaintiffs, as the prayer made in the application and the relief sought in the suit are interconnected. He further submits that the Court will not come to the aid of a party to collect evidence, the onus of which lies upon the said party. He submits that after accepting the present petition, the application as filed by the respondents-plaintiffs deserves to be rejected.

16. On the other hand, Mr. Devender K. Sharma, learned counsel for the respondents-plaintiffs, has defended the impugned order. He submits that the learned trial Court has passed a well reasoned order and it does not call for any interference. He submits

that in order to elucidate the controversy in hand, the learned trial Court was right in appointing the Local Commissioner. He submits that the present petition, being devoid of any merit, deserves to be dismissed.

17. I have heard the learned counsel for the parties and also gone through the material placed on record carefully.

18. In the present case, the plaintiffs-respondents have filed the suit primarily for the cancellation of documents, declaration, possession, permanent prohibitory injunction, and mandatory injunction. The plaintiffs-respondents have sought decree of declaration, challenging the sale deed bearing No.399 dated 08.03.2004 executed by Late Shri Sawanu Ram in favour of defendant No.1 along with its mutation to be cancelled and declaring the same to be null and void, by further passing a decree of declaration that the parties are joint owners in possession of the land transferred through the said sale deed. It has further been prayed that decree for possession of two rooms of the slate-roofed double-storied house constructed by Late Shri Prem Singh be granted in favour of plaintiffs No.2 to 6 and against defendants No. 2 to 5.

19. In prayer No. 7, it has been prayed that defendants No. 2 to 5 be further restrained from causing any obstruction on the main path/road which is existing on the northern boundary of old Khasra No.663 in front of houses of the plaintiffs and defendants, especially in

the area in front of their houses, the width of which is 8 feet starting from the link road adjacent to the house of defendants No. 2 to 5 up to the slate-roofed house of Prem Singh by putting/planting hedges and bushes or by any other way and passing a decree for permanent prohibitory injunction.

20. The learned trial Court, in the application filed by the respondents-plaintiffs, passed an order of status quo and the said fact has been duly acknowledged by the learned counsel for the parties. Thereafter, in mandatory form, the respondents-plaintiffs filed an application under Order 39 Rules 1 and 2 CPC seeking the removal of the obstruction created by the respondents during the pendency of the suit on the path/road existing on the suit land as per the version of the plaintiffs-respondents. The pleadings in the said application are complete and another instant application came to be filed by the respondent under the provisions of Order 26 Rule 9 and Order 39 Rule 7 of the CPC for the appointment of Local Commissioner.

21. The provisions of order 26 Rule 9 of CPC read as follows:

“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 thereon 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.”

22. The provisions of Order 26 Rule 9 of the CPC categorically lay down that in case the Court deems fit to conduct a local investigation 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 thereon to the Court:

23. In the present case, the reliefs sought in the main civil suit and the application under Order 39 Rules 1 and 2 CPC, wherein a prayer in mandatory form has been made for the removal of the encroachment from the suit land, have been made by the present respondents-plaintiffs. Now, in the instant application which has been filed, a prayer has been made to appoint Local Commissioner to investigate the suit land in order to ascertain the status of the suit property.

24. It is a basic principle of law that a person, who alleges has to prove his case but allegations of interference and encroachment after passing of the injunction order have been levelled and raised by the plaintiffs. Therefore, it is incumbent upon the plaintiffs to substantiate their case by leading and placing material documents on record. The plaintiffs cannot take an aid of the Court to collect

evidence in order to corroborate their case. The application for appointment of Local Commissioner cannot be allowed in a routine manner and the same can be allowed in those cases which are bonafide for the determination of the controversy in question. Merely on the asking of the parties, the Local Commissioner cannot be appointed.

25. The plaintiffs-respondents have to stand on their own legs by adducing independent and reliable evidence and they cannot invoke the provisions of Order XXVI and Rule 9 of CPC and call upon the Court to generate evidence for them.

26. It is too well-known that the Court is not expected to create evidence for any of the parties to the *lis*. It is for the plaintiffs to prove that the defendants have encroached upon their land and this they can do so by leading evidence as is permissible under the Evidence Act.

27. This Court in ***CMPMO No.208 of 2019*** titled as ***Naseeb Deen and another vs. Harnek Singh***, decided on 19.07.2019 has held that the onus is upon the plaintiff to prove encroachment and when there is no evidence that the plaintiff had approached the revenue authority for the demarcation of the suit land, it is not permissible to appoint the Local Commissioner to demarcate the suit land.

28. In the present case also, there is no material on record to demonstrate that the plaintiffs at any stage have approached the revenue authority for demarcation of the land in issue. Therefore, filing of the application by the plaintiffs but obvious is an attempt to create evidence in their favour.

29. This Court in **CMPMO No.272 of 2019** titled as **Ram Nath and another vs. Kuldeep Singh and others**, decided on 25.06.2019 as held as follows:

“14. Order 26, Rule 9 of the Code inter alia provides that 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, the Court may issue a commission to such person as it thinks fit directing him to such investigation and to report thereon to the Court.

15. In my considered view, primarily whenever any order is passed, under Rule 9 of Order 26 of the Code, the satisfaction has to be of the Court as to whether local investigation for the purpose of elucidating any matter in dispute is necessary or not. This satisfaction cannot be of the plaintiffs or defendants. The plaintiff or the defendant has to stand on its own legs and provisions of Order 26, Rule 9 of the Code cannot be used to garner or gather evidence for them through the Court process. This is exactly what has been held by the learned Court below by way of the impugned order. Learned Court has held and rightly so that onus is upon the plaintiffs to prove their case and the Court cannot lend a helping hand and assist the plaintiffs to prove their case. These findings returned by the learned Court below cannot be said to be illegal as they are in consonance with the spirit of law with regard to the interpretation of Order 26, Rule 9 of the Civil Procedure Code. Plaintiffs cannot be permitted to a local commissioner appointed simply because they have not been able to lead cogent evidence to prove their case. That is not the intent of Order 26, rule 9 of the Code.”

30. From a perusal of the same, it is clear that Order XXVI Rule 9 CPC is not a panacea that can be used by litigants as a tool whenever they feel that they are not in a position to prove their case.

31. Similar view was taken by this Court in **CMPMO No.195 of 2024** titled as **Kewal Krishan vs. Gram Sabha Tikka and another**, decided on 19.06.2024, wherein it was observed as under:

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5. Having gone through the order passed by the learned Court below and having heard learned Senior Counsel for the petitioner/plaintiff as also learned Counsel for the respondent/defendant, this Court does not find any perversity in the impugned order. When it is a matter of record that the petitioner had sought amendment in the suit on the ground that during the pendency of the suit, certain part of the suit land stood encroached by the defendant, this pre-supposes that the petitioner was aware of his boundaries and only thereafter, he levelled allegations against the respondent of encroaching upon his land. In this background, but natural, the petitioner cannot be permitted to call upon the Court by way of appointment of a Local Commissioner to create evidence to prove his allegation as to whether part of the suit land mentioned in the application filed under Order 26, Rule 9 of the Code of Civil Procedure stood encroached upon by the defendant or not.”

32. As per the exposition of law and the consistent legal propositions when any suit has been filed on the premise that the defendant has made encroachment, recourse cannot be held to be appointment of Local Commissioner for demarcating the suit land and it is for the applicant to establish this fact by leading independent

evidence. The initial onus is upon the applicant to establish the case of encroachment by leading cogent and authentic evidence. Otherwise also, the Local Commissioner cannot be appointed for the collection of the evidence and for determining the encroachment made by the respondent and if the Court appoints Local Commissioner in the present case, then certainly it would amount to collection of the evidence with the aid of Court which cannot be accepted.

33. What is the measurement of the suit passage and whether the same has been obstructed or encroached upon are matters which are required to be proved by the plaintiffs/respondents by leading cogent and convincing evidence to this effect, therefore, the recourse to the appointment of the Local Commissioner for demarcating the suit land, at this stage, is impermissible. Obviously, the application as filed by the plaintiffs/respondents is just to collect the evidence by taking aid of the Court. The said principle of law has been enunciated by this Court in ***Liaquat Ali vs. Amir Mohammad & others Latest Himachal Law Judgments 2016 (HP) 831***, wherein it was held as under:

“3. Learned trial court dismissed the application by assigning the following reasons:

“It was laid down by Hon’ble High Court in Divakar Dutt Vs. Ranjit Singh 1997 (1) SLJ 242 that ‘when any suit has been filed on the premise that respondent has made encroachment, recourse cannot be held to be appointment of local commissioner for demarcating the suit land and it is for the applicant to establish this fact by leading independent evidence. Similar is the judgment in Jeet Ram Vs. Sita Ram, 2002 HLJ 1173. Therefore, in view of this binding precedent,

local commissioner cannot be appointed and it is for the applicant to establish the claim of encroachment by leading independent evidence. Otherwise also, the local commissioner cannot be appointed for the collection of evidence and for determine the encroachment made by the respondent and if court appoints the local commissioner in the present case, then it would amount to collection of evidence with the aid of court which cannot be accepted. References be made to Institute of Engineers Vs. Vishnu Pada, AIR 1978 Cal 296.”

4. Petitioner has assailed the aforesaid order on various grounds taken in the petition. Before proceeding to the merits of the matter, it needs to be reiterated that the object of local investigation is not to collect evidence, but to obtain such material, which from its peculiar nature, can be had only at the spot. The object of order 29 Rule 9 CPC is not to assist a party to collect evidence.

5. What is the measurement of the suit passage and whether the same has been obstructed or encroached upon are matters which were required to be proved by the petitioner by leading cogent and convincing evidence to this effect and, therefore, recourse to the appointment of Local commissioner for demarcating the suit land at this stage is impermissible as both the parties have led their evidence. Obviously the application now preferred by the petitioner is mischievous as the petitioner wants the court to collect evidence for him through the Local commissioner.”

34. In the present case, the allegations have been levelled by the plaintiffs-respondents that there exists 8 feet wide motorable road and that the same has been narrowed down by the defendants-petitioners. The initial onus lies upon the plaintiffs to discharge the

same. By adopting shortcut methods, the respondents-plaintiffs cannot be permitted to collect evidence, that too with the aid of the Court.

35. Admittedly, the respondents-plaintiffs have not taken the assistance of the local revenue officer to demarcate the suit land in order to elucidate and substantiate the contentions of any encroachment over the path in question. The suit in hand is at the preliminary stage and this Court has been informed that issues are yet to be framed in the present case. In absence of the framing of issues and leading of evidence, the learned trial Court has erred in appointing a Local Commissioner to aid the case of the present respondents-plaintiffs, the onus of which lies upon them. In the considered opinion of this Court, the application which has been filed is misconceived at this initial stage. This Court is in agreement with the contention raised by the learned counsel for the petitioners that prayers as made in the main suit and the application in hand are interconnected and the relief as granted in the application would amount to granting main relief in the suit.

36. The learned trial Court has not assigned any authentic reasons while allowing the application filed by the respondents-plaintiffs. The plaintiffs are required to plead and prove their case by corroborating and substantiating the pleadings placed on record. After the framing of issues, the respondents-plaintiffs are required to

discharge the onus to prove any kind of interference or encroachment over the suit land.

37. Therefore, in the considered opinion of this Court, the learned trial Court has erred in allowing the application. Consequently, the present petition is allowed and the application filed by the respondents-plaintiffs is dismissed.

38. Pending miscellaneous application(s), if any, shall also stand disposed of.

39. Before parting, it is made clear that any observation made here-in-above shall not be taken as an expression of opinion on the merits of the main case and the same shall be adjudicated upon uninfluenced by any observation made here- in-above, which are only for the purpose of the instant petition

(Romesh Verma)
Judge

17thAugust, 2026
(vt)