

***IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH***

**Civil Revision No. 235 of 2015 (O&M)
Date of decision:- 14.09.2015**

Banarsi Dass

...Petitioner

Versus

Sardha Ram & others

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. P.C. Chaudhary, Advocate
for the petitioner.

Mr. Madan Gupta, Advocate
for respondents No. 1 to 3.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RITU BAHRI J.

This petition under Article 227 of the Constitution of India is for setting aside order dated 19.11.2014 passed by the learned Addl. District Judge Yamuna Nagar at Jagadhari, whereby the application of the petitioner for appointment of Local Commissioner to demarcate the suit land, has been dismissed.

The case of the petitioner was that he is owner of property measuring 17 marlas comprising Khasra No. 122 situated at village Guglon-432 and defendants who are owners of adjoining land bearing Khasra No. 123 have illegally encroached upon a part of Khasra No.

122. The petitioner filed a suit for possession of property measuring 104 sq yards i.e East 14' West-6', South 94', North 94' out of Khasra No. 122 measuring 17 marlas situated at village Guglon-432 Tehsil Jagadhari, Yamuna Nagar with directions to the defendant to remove the construction in the form of boundary wall and other material and to hand over possession of the said property to the petitioner and also for permanent injunction restraining the defendants from raising any sort of construction in any manner whatsoever over the said property.

In a suit filed by the petitioner, he relied upon a report of the Private Local Commissioner, which was not accepted by the learned trial Court. The petitioner filed the application (P-3) for appointment of local Commissioner, which was rejected by the learned trial Court vide its order dated 28.07.2010 and finally the trial Court dismissed the suit of the petitioner on 27.08.2011. The petitioner preferred appeal before the District Judge, Yamuna Nagar at Jagadhar against the judgment and decree dated 27.08.2011. During pendency of the appeal, at the stage of final arguments, the petitioner filed the present application under Order 26 Rule 9 C.P.C for appointment of Local Commissioner with directions to demarcate both Khasra No. 122 (0-17) and Khasra No. 123 (1-7) and to report about the fact of encroachment on Khasra No. 122 by defendants (P-7), which was declined by the Lower Appellate Court, vide its order dated 19.11.2014

(P-8).

Learned counsel for the petitioner argued that there is no dispute with regard to Khasra No. 122 and 123. Both the parties have a common boundary and to ascertain the extent of encroachment by the defendants on the site, the prayer for appointment of Local Commissioner was made, which was wrongly rejected by the Lower Appellate Court.

On the other hand, learned counsel for the respondent has argued that in a suit for possession, the question of possession cannot be ascertained by appointing a Local Commissioner. The parties have to lead their evidence to establish their possession.

To give force to its contention, learned counsel for the petitioner has made reference to judgments of Hon'ble the Supreme Court in a case of ***Haryana Waqf Board vs. Shanti Sarup and others, 2008(8) SCC 671, State of Assam vs. Union of India and others, 2010(9) SCC 278 and Suryanarayana Reddy and others v. Nawab Md. Kabiruddin Khan (D) by LRs and others, 2011(7) R.C.R (Civil) 410*** to contend that the trial Court and any other Court of appeal are empowered under Order 26 Rule 9 CPC to appoint Local Commissioner to make local investigation. In Suryanarayana Reddy's case (supra), Hon'ble the Supreme Court was examining an interlocutory order passed by the High Court whereby High Court

directed a Commission for local investigation to be appointed. Hon'ble the Supreme Court while dismissing the appeal has held in para 3 as under:-

“3. The power to appoint Commission to make local investigation conferred on the Court by Order 26 Rule 9 CPC, is available to be exercised by the trial Court and also by any Court of appeal. Whether the High Court would interfere with the findings of facts or not, is a question which will be gone into at the time of final hearing and all the pleas which are sought to be urged before this Court, are available to be urged before the High Court.”

Further reference has been made to a judgment of Hon'ble the Supreme Court in a case of Radhey Shyam Rastogi vs. Ashish Kumar and another, 2008(4) RCR (Civil) 642 wherein the tenant was evicted by the trial Court on the ground that building was in a dilapidated condition. The appellate Court and High Court rejected the request of tenant for appointment of Local Commissioner. Hon'ble the Supreme Court allowed the application of the tenant, after a gap of 25 years and held that since the eviction of the tenant was sought only on the ground that the building was in dilapidated condition, it would be proper to appoint Independent Engineer/Advocate commission for coming to proper finding.

The ratio of the above mentioned judgments is directly applicable to the facts of the present case wherein there is no dispute that the petitioner and defendants are owners of Khasra No. 122 and 123 separately and the case of the petitioner was that the defendants had encroach some part of Khasra No. 122 by raising some construction and due to that, he filed an application to ascertain the extent of encroachment by the defendants on the site and the Lower Appellate Court should have allowed the application of the petitioner so as to get the demarcation done, as per Order 26 Rule 9 CPC.

In view of the above mentioned judgments, order dated 19.11.2014 passed by the learned Addl. District Judge Yamuna Nagar at Jagadhari is set aside with a direction to the learned Additional District Judge Yamuna Nagar at Jagadhari to appoint a Local Commissioner and after getting a report from the Local Commissioner, proceed with the appeal pending before it.

The petition stands allowed.

14.09.2015

G Arora

(**RITU BAHRI**)
JUDGE