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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 491/2017

DHANNO DEVI

..... Petitioner

Through: Mr.J.M.Kalia, Sr. Advocate with
Ms.Bhawana Garg, Advocate.

versus

RAM CHANDER

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

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02.05.2017

CM No.16763/2017

1. Exemption allowed, subject to all just exceptions.
2. The application is disposed of.

CM(M) 491/2017

1. Through this petition filed under Article 227 of the Constitution of India, the petitioner has challenged the order dated 27th February, 2017 whereby the learned ACJ (Central) dismissed the application of the petitioner for appointment of the Local Commissioner to ascertain the total number of shops existing at the ground floor of the suit property and nature of user by the occupants of the upper floor has been dismissed observing as under:

“I have heard the arguments and perused the record carefully. I have also gone through the judgments relied upon by the parties.

The main plank of the argument of petitioner is that there are four shops situated at Ground Floor portion of suit premises, out of which three shops are in the occupation of her sons and one shop is in occupation of respondent in the capacity of tenant. In the written statement filed by respondent, it is submitted that there are five shops on the Ground Floor of the sit premises and not four and the Local Commissioner is necessary for the ascertainment of the said fact.

There is no quarrel with the proposition of law laid down by the judgments relied upon by the parties. It is settled principal of law that the Court cannot be used as means to collect the evidence on behalf of parties. In my opinion, the fact whether there are four shops at Ground Floor or there are five shops at Ground Floor can be proved by the parties by leading their respective oral and documentary evidence.

In view of the facts of the case, I am of the opinion that the present application of the petitioner cannot be allowed as the fact can be ascertained by leading evidence by respective parties and there is no need to appoint the Local Commissioner for the same. The present applicator deserves dismissal and accordingly, the same is dismissed.”

2. Learned counsel for the petitioner submits that the eviction petition bearing E-77429/16 has been filed under Section 75 read with Order 26 Rule 9 CPC in respect of the shop in occupation of the respondent. In the application seeking leave to defend as well in the written statement the respondent has taken the plea that there are five shops on the ground floor and not four as pleaded by the petitioner. The application for appointment of the Local Commissioner was moved to ascertain the true facts which has been dismissed vide impugned order observing that Courts cannot be used to collect the evidence on behalf of the parties.

3. Learned counsel for the petitioner has relied upon the decision of Supreme Court in following cases:

- (i) AIR 1998 Raj 224 *Union of India (UOI) and Anr. V. Kripal Industries.*
- (ii) AIR 2003 Himachal Pradesh 87 *Bali Ram v. Mela Ram & Anr.*
- (iii) AIR 1986 Madras 33 *Ponnusamy pandaram v. The Salem Vaiyappamalai Jangamar Sangam*
- (iv) AIR 1988 SC 2126 *Southern Command military Engineering Services Employees Co-op. Credit Society vs. V.K.N. Nambiar (since deceased) by legal representatives Madhvi Devi.*
- (v) AIR 2001 SC 996 *Lekh Raj v. Muni Lal & Ors.*

4. It is settled legal position that Local Commissioner cannot be appointed by the Court for collecting the evidence in respect of the facts pleaded and required to be proved by the parties. Disputed question of fact i.e. whether there are four shops on the ground floor as pleaded by the petitioner or five shops as pleaded by the respondent can be decided by the learned ARC after parties are given an opportunity to lead evidence in support of their respective pleas.

5. The power of appointment of the Local Commissioner under Order XXVI Rule 9 CPC cannot be exercised by the Court to assist the party to collect evidence where the evidence can be adduced by the concerned party by necessary oral/documentary evidence.

6. In the instant case written statement has already been filed and disputed question of fact about the number of shops on the ground floor need to be adjudicated after recording evidence of the parties for ascertaining the actual number of shops on the ground floor of the suit

property. Thus, appointment or assistance of the Local Commissioner is neither permissible nor desirable.

7. The case law cited by learned counsel for the petitioner in support of his contentions has no applicability to the facts of the present case as the purpose of appointment of the Local Commissioner is to obtain such evidence, which from its peculiar nature, cannot be lead by the parties in the Court. The power under Order XXVI Rule 9 CPC being discretionary in nature, it can be exercised only for just decision of the case and cannot be used as a tool to collect evidence on behalf of the parties.

8. Since the reliance placed by learned counsel for the petitioner on the decisions reported above has no applicability to the facts in the present case wherein the purpose to seek appointment of Local Commissioner is just to count the number of shops existing on the ground floor or user on the upper floor, the learned Trial Court has rightly exercised the discretion while dismissing the application under Order XXVI Rule 9 CPC seeking appointment of the Local Commissioner.

9. The impugned order does not suffer from any illegality or perversity so as to require any interference by this Court.

10. The petition is dismissed.

CM No.16762/2017 (stay)

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 02, 2017

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