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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 02.01.2017

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CM(M) 1276/2016 & CM Nos.45986-987/2016

SHANTI DEVI

..... Petitioner

Through

Mr.Rama Shankar, Mr.Shivam Garg,
Mr.Sudhir Sokhija & Ms.Kamlesh,
Advocates

versus

JAI BHAGWAN & ORS

..... Respondents

Through

Mr.V.P.Rana & Mr.Gaurang Bindra,
Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

CM No.45987/2016 (*exemption*)

Allowed subject to all just exceptions.

CM(M) 1276/2016 & CM No.45986/2016(*stay*)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 19.10.2016 by which an application filed under Order 26 Rule 9 CPC was dismissed.
2. The background facts are that the petitioner has filed the suit for possession and permanent injunction regarding a plot of land measuring 130 sq.yds. The said plot of land is said to have bought vide documents like GPA, Agreement to Sell, Receipt and Affidavit by the petitioner.
3. It is urged that in 2004, the respondents have trespassed on the said plot of land and illegally occupied the same. The suit was filed in 2004. The

trial court by decree dated 05.09.2011 dismissed the suit.

4. The petitioner has now filed an R.F.A. before the appellate court and the same is pending. In the appellate court, the petitioner filed this application under Order 26 Rule 6 CPC with the prayer to appoint a Local Commissioner for the following purposes:

“(i) That the Local Commissioner may kindly be appointed to inspect the property in question, to ascertain and take the measurement of the boundaries i.e. the Rasta and Road particularly in the East and West side of the plot in question as in the year 1991, when appellant purchased and raised boundary around the suit property.

(ii) That in order to ascertain as to how the land measuring 250 sq. yds. out khasra No.136/12/1/2/2 as mentioned in the registered GPA dated 21.04.1987 of Krishna Gopal Maheshwari in favour of Ms.Rekha has changed into khasras No.136/12/2/2/ int he subsequent chains of documents and East Rasta 12 ft. changed into 8 ft. and West Rasta of 8 ft changed into 20 ft. rasta, when there was no space available after appellant possession on 09.07.1991.

(iii) The Local Commissioner may kindly be further directed to ascertain the residents of North and South side of the suit property, clearly mentioning their plot area and date of possession etc.”

5. The appellate court dismissed the application stating that the power of appointment of a Local Commissioner is a discretionary power. In the present case, the genuineness of the documents of the respondents cannot be ascertained with the appointment of Local Commissioner. Hence, the appellate court dismissed the application.

6. I have heard the learned counsel for the parties.

7. The learned counsel appearing for the petitioner has argued that as per title documents of the petitioner, i.e. Agreement to Sell and Power of Attorney etc. the gali in the East is 8 ft. and the gali in the West is 15 ft. whereas the subsequent documents produced by the respondents shows that gali in the East is 8 ft. and in the West is 20 ft. It is necessary for the Local Commissioner to visit these sites and measure the dimension of the gali in East and the West. He relies upon the judgment of the Supreme Court in the case of *Haryana Waqf Board v. Shanti Sarup & Ors., 2008 (8) SCC 671* stating that the Local Commissioner could be appointed at any stage of the proceedings.

8. The suit is based on title. As per the plaint, the petitioner claims title based on the documents executed by respondent No.2, namely GPA, Agreement to Sell, Receipt and Affidavit in favour of the petitioner. It is for the petitioner to prove these documents and that respondent No.2 had the title to the suit property through whom the petitioner derives his title. Appointment of Local Commissioner would not be of any help to the petitioner in this regard.

9. Further a perusal of the plaint shows that the contention of the petitioner is that forgery of the documents produced by respondents is apparent as the topography of the property in dispute and the topography of the property as shown in the documents produced by the respondent is different. It is claimed that as per the title documents of the petitioner, the property is bounded by 8 ft. in the East and 15 ft. in the West. On the other hand, the documents filed by respondent Nos.1 and 3 shows that gali is 8 ft. in the East and 20 ft. in the West. Essentially what the petitioner wants to show is that on account of variation in the topography as shown in the title

document of the respondents, the title documents of the respondents are defective/void.

10. The argument has no basis as it was for the petitioner to have proved these facts about the topography by leading cogent evidence. The present application for appointment of a Local Commissioner who would carry out investigation on behalf of the petitioner is misplaced and it is not for the Local Commissioner to gather evidence on behalf of the petitioner. The object of Order 26 Rule 9 CPC is not to assist a party in gathering evidence, where the party can get evidence itself.

11. I may also note that the application itself seeks a relief, which cannot be granted. As per the application filed by the petitioner, he seeks appointment of a Local Commissioner to take measurement of the boundaries/roads in the East and the West as in the year 1991. How can a Local Commissioner measure the boundaries/roads as in the year 1991. Similarly, the application seeks to ascertain as to how the land measuring 250 sq. yds. out of the concerned khasras, which is described in the documents in favour of other purchaser Ms.Rekha, the dimensions of the East rasta and West rasta have changed.

12. Further, the application to appoint a Local Commissioner has now been filed before the appellate court 10 years after filing of the suit. No plausible explanation is forthcoming to explain this delay.

13. The judgment of the Supreme Court in ***Harayan Waqf Board v. Shanti Sarup & Ors. (supra)***, related to a matter where the suit has been filed by the Punjab Waqf Board for declaration and injunction. The controversy was as to whether the respondents had encroached upon any land belonging to the appellant board. As it was a case of demarcation of the

disputed land the Supreme Court held that it was appropriate for the court to direct the investigation by appointing a Local commissioner. Admittedly, the present case is not a case of demarcation of disputed land the petitioner has filed the suit for possession based on the title documents. It was for the petitioner to prove those title documents.

14. In view of the above, the present petition is dismissed. All the pending applications are also dismissed.

15. Anything stated hereinabove shall not influence any of the parties in disposal of the appeal before the trial court.

JAYANT NATH, J.

JANUARY 02, 2017/v