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

+ **CM(M) 781/2017**

MADAN LAL GUGLANI

..... Petitioner

Through: Mr. S. Chaturvedi & Ms. Shilpi
Chaudhary, Advs.

Versus

BANI SINGH & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **26.07.2017**

CM No.26303/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

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3. This petition under Article 227 of the Constitution of India impugns the order (dated 13th April, 2017 in Civil Suit No. 115/2017 of the Court of Additional Civil Judge (ACJ)-cum-Additional Rent Controller (ARC), North West District, Rohini Courts, Delhi) of dismissal of the application filed by the petitioner / plaintiff under Order XXVI Rule 9 of the CPC.
4. The petitioner / plaintiff instituted the suit from which this petition arises for the reliefs of permanent injunction restraining the defendants from raising unauthorized constructions in land measuring 2 Bighas 9 Biswas i.e. 2450 sq. yds. falling in Khasra No.48/24/1 of village Pooth Kalan, Delhi and of mandatory injunction directing the defendants to demolish the unauthorized construction already made on the said property.

5. The suit was accompanied with an application for interim relief.
6. Vide order dated 9th March, 2017, the learned Additional Senior Civil Judge (ASCJ) called from the concerned Deputy Commissioner, North Delhi Municipal Corporation (NrDMC) and Sub Division Magistrate (SDM) concerned, a report regarding the description and identification of the property in which the work was being carried out by the defendants and had been ordered by NrDMC to be stopped vide Stop Work Notice dated 15th February, 2017. It was also specified that the report must include the khasra number in which the property falls.
7. The counsel for the petitioner / plaintiff informs that the need for calling for the said report arose because the defendants on appearance before the Court took a stand that they were not carrying out construction in the property subject matter of the suit but on an adjoining property.
8. The petitioner / plaintiff filed the application under Order XXVI Rule 9 of the CPC, against dismissal whereof this petition has been preferred, seeking local investigation as well as identification of the property in question by way of demarcation of the property by the concerned SDM/RA (Rohini) through Total Station Method (TSM).
9. The learned ASCJ in the impugned order has observed that a) it was the contention of the counsel for the petitioner / plaintiff that the report submitted pursuant to order dated 9th March, 2017 was not in terms of the directions in the order dated 9th March, 2017; that the report had not been signed by the SDM but by the Executive Magistrate / Tehsildar; that the report had been submitted at the instance of the defendants; and, that the only way in which the property could be identified in heavily built up areas

was by way of TSM; b) per contra, it was the contention of the counsel for the defendants that the petitioner / plaintiff has to prove his own case and cannot seek issuance of a commission to collect evidence on his behalf.

10. The learned ASCJ, in the impugned order, has held i) that as per the report (pursuant to order dated 9th March, 2017) of the concerned Executive Magistrate based on the output given by Field Kanoongo and Halka Patwari, the property whose description was sought to be verified by TSM was situated in Khasra No.48/24/2(1-09); ii) that had there been any difficulty in ascertaining the description of the property in question, the concerned officials would have themselves suggested the need for TSM; iii) that just because the report is not favourable to the petitioner / plaintiff, is no ground for the petitioner / plaintiff to term the same as false; iv) that field inspection had been done by the Field Kanoongo only, though basis of such measurement has not been mentioned in the report; v) the report of any authority cannot be permitted to be challenged by calling for another report; vi) that as per the report, the property where construction was going on did not fall in the Khasra number qua which the suit had been filed; vii) that it is not the case of the petitioner / plaintiff that demarcation of the property can only be done under the orders of the Court; viii) that the petitioner / plaintiff can himself approach the concerned authorities with the request of getting the demarcation done if required and the petitioner / plaintiff is free to make any application before any authority in this regard.

11. In the aforesaid state of affairs, I have at the outset enquired from the counsel for the petitioner / plaintiff whether the petitioner / plaintiff has filed any objections to the report in pursuance to the order dated 9th March, 2017.

12. The counsel for the petitioner / plaintiff though states that no objections to the said report had been filed but states that his application under Order XXVI Rule 9 was by way of objections.

13. When a survey/demarcation report is ordered by the Court, apparently with the consent of the counsel for the petitioner / plaintiff who did not object to the same, the petitioner / plaintiff if finds fault with the said report and does not want the suit to be disposed of in terms thereof is required to prefer objections to the report and which objections would then be dealt with in accordance with law. An application under Order XXVI Rule 9 of the CPC cannot be a substitute for objections to a report of local investigation ordered by the Court.

14. The counsel for the petitioner / plaintiff then contends that since the area is heavily built up, the demarcation could have been carried out only by TSM and not otherwise.

15. I have enquired from the counsel for the petitioner / plaintiff that if that is his stand, why did he not on 9th March, 2017 insist upon the report to be drawn up by using the TSM and object to the order.

16. The counsel for the petitioner / plaintiff has drawn attention to the order dated 15th February, 2017 in the suit recording the contention of the counsel for the petitioner / plaintiff for use of TSM.

17. If that was so, it is inexplicable as to why the petitioner / plaintiff on 9th March, 2017 was satisfied with the order of the Court without specifying TSM.

18. The counsel for the petitioner / plaintiff states that the report had to be in accordance with Rules and which require the survey to be done only by way of TSM.
19. However on enquiry he states that the Rules do not provide for TSM.
20. I have enquired, whether the petitioner / plaintiff, after the order dated 9th March, 2017 approach the SDM to prepare the report by using the TSM.
21. The same was also not done.
22. The learned ASCJ in the impugned order has already given liberty to the petitioner / plaintiff to apply to the authorities to carry out the demarcation by TSM.
23. The petitioner / plaintiff, if of the view that demarcation should be done by TSM, can always apply to the authorities.
24. The counsel for the petitioner / plaintiff states that TSM is adopted only under orders of the Court.
25. Then arises another question i.e. whether the petitioner / plaintiff, if the dispute is only of demarcation, is at all required to file a suit inasmuch as if by leading evidence in the suit, the petitioner / plaintiff is unable to prove identity of the property, then no purpose would be served in pursuing the suit.
26. At this stage, the counsel for the petitioner / plaintiff states that he is satisfied with the directions in the impugned order giving him liberty to apply to the authorities for demarcation by TSM.

27. If that be so, then pursuing this petition is misconceived.
28. Dismissed.
29. Dismissal of this petition would not come in the way of the authorities considering the application of the petitioner / plaintiff for demarcation by TSM in accordance with the liberty already granted in the impugned order.
30. The authorities are expected to treat the application of the petitioner / plaintiff for demarcation by TSM in accordance with law.

RAJIV SAHAI ENDLAW, J

JULY 26, 2017
'gsr'..