

\$~11

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

+ CM(M) 1152/2015

MUKESH JAIN

..... Petitioner

Through: Mr.Fanish K.Jain & Mr.Neeraj  
Gahlaut, Advocates.

versus

ANIL SHARMA & ORS

..... Respondents

Through: Mr.Anil Sharma & Mr.Ankur Khatri,  
Advocates for R-1.  
Mr.P.K.Saxena, Mr.Deepak Dahiya &  
Ms.Aayushi Saxena, Advocates for  
R-2/DDA  
Ms.Prabhsahay Kaur & Ms.Shilpa  
Dewan, Advocates for R-4 to R-8.  
SI Jaspal Singh, PS Vijay Vihar

**CORAM:**

**HON'BLE MS. JUSTICE PRATIBHA RANI**

**ORDER**

%

**09.05.2017**

CM(M) 1152/2015

1. The petitioner is invoking jurisdiction of this Court under Article 227 of the Constitution of India with the prayer for setting aside the order dated 23<sup>rd</sup> September, 2015 whereby the learned trial Court dismissed the application filed by him for appointment of second local commissioner.
2. For disposal of this petition it is necessary to reproduce the contents of the application filed by the petitioner, under Order XXVI Rule 10 CPC, for appointment of second local commissioner which reads as under:-

*“1. That the applicant is the defendant no.9 in the present suit, which is subjudice before this Hon'ble Court, for the above noted date.*

*2. That the commissioner has submitted suspicious and wrong report dated 11/05/2015 with connivance of plaintiff and rest of the defendant.*

*3. That the applicant/defendant No.9 needs another process of demarcation be carried out as the earlier demarcation done on 16.4.15, 17.04.15 and 18.04.15 by the local commissioner was misleading. The Local Commissioner could not find survey stone which can be considered as fixed point and as per the RTI filed by the defendant, the FIRNI of the village abadi is to be considered as fixed point as the same is fixed at the time of consolidation, which was refused to be taken by the Local Commissioner as a fixed point. It is submitted that the fixed point taken in the instance case was a well/Kuan in Khasra No.81/26 recorded in Masavi of Rithala Village. The copy of said RTI is annexed here with as Annexure “A”.*

*4. That the Local commissioner failed to appreciate the fact that the TSM Surveyor engaged in the said demarcation was hired/arranged by the plaintiff thus the same was not the empanelled Surveyor of the Revenue Department. It is pertinent to mention here that the demarcation proceedings/report was finalized without taking the measurements from the revenue record of the Village Rithala and that too without the knowledge of the Revenue Authorities, North West.*

*5. That direction may be issued by this Hon'ble Court to appoint a fresh local commissioner who may file a report against actual situation of the land as well as evaluate the same, to meet ends of justice.”*

3. The above application was dismissed by the learned trial Court on 23<sup>rd</sup> September, 2015 **noting the fact that the report of the first local commissioner was yet to be accepted.**

4. The prayer made in this petition is to the following effect:-

*“i) Call for records Suit No.69/2015, titled as, “Shri Anil Sharma versus DDA and Ors.,” pending in the Court of Shri Shailender Malik, Senior Civil Judge, Rohini Courts.*

*ii) Set aside/quash the impugned order dated 23<sup>rd</sup> September, 2015 passed by Shri Shailender Malik, Senior Civil Judge, Rohini Courts, Delhi in Suit No.69/2015, titled as, “Shri Anil Sharma versus DDA and Ors.”.*

5. Learned counsel for the petitioner has submitted that the contentions raised by the petitioner against the report of the local commissioner though noted by the learned Trial Court in the order impugned, the same have not been dealt with.

6. Learned counsel for the petitioner has further contended that the application for appointment of another local commissioner for the reasons mentioned in the application could not have been dismissed as the first report was by a TSM Surveyor who was not the empanelled surveyor of the revenue department and was hired by the plaintiff. The demarcation proceedings were finalized without taking the measurement from the revenue record of the village Rithala. ‘Firni’ was not considered as a fixed point rather a ‘well’ recorded in masabi and other revenue record of village Rithala was considered as fixed point. The local commissioner also acted in connivance with the plaintiff and intervened in the process of demarcation which was to be conducted only by the revenue department.

7. I have considered the submissions made by the learned counsel for the petitioner and I am of the view that if the grievance of the petitioner was that his contentions have not been dealt with by the learned Trial Court, then the remedy is not available under Article 227 of the Constitution of India. While rejecting the prayer of the petitioner who is defendant No.9 in Civil Suit No.69/2015 learned Trial Court has specifically observed that the report of the local commissioner is yet to be accepted by the Court.

8. The short question that arises for consideration in this petition is

whether the Court below acted illegally in rejecting the request of the petitioner/defendant No.9 for appointment of second local commissioner.

9. In the decision reported as AIR 1985 Ker 83 *Swami Pramananda Bharathi vs. Swami Yogananda Bharathi*, Division Bench of Kerala High Court after examining the earlier decisions on the subject, held that without setting aside the report of first local commissioner, second local commissioner cannot be approved. The relevant portion of the judgment reads as under:

*“Appointment of second Commissioner, without setting aside previous Commissioner’s report and proceedings, being illegal or otherwise beset with a jurisdictional error, S.99 of C.P.C. can be of no avail. In this context, it is to be remembered that the word “jurisdiction” is a “verbal cast of many colours”, and the dividing line between lack of jurisdiction or power and erroneous exercise of it, is very thin, but nonetheless the distinction between the two has not been completely wiped out and in the final analysis, the concept of jurisdiction for the purpose of judicial review, has been one of public policy. It appears that, if the error of law, committed by the Court or Tribunal is “vital” or a “flagrant one”, it is considered to be a jurisdictional error.....”*

The Bench further held that a restricted compliance of Order XXVI Rule 12 CPC is necessary on the ground of public policy. The relevant portion of the judgment reads thus:-

*“Appointment of second Commissioner and the reports filed by him without setting aside first commissioner’s report, is wholly illegal and without jurisdiction. In such case reliance on second Commissioner’s report for deciding case will be unauthorised and without jurisdiction. Only if the Court has reason to be dissatisfied with the proceedings and report of the first Commissioner for reasons stated, it can appoint a second Commissioner for further inquiry. This is a condition precedent. The provision contained in O.26, R.12, is “vital”.*

*Strict adherence alone will facilitate speedier, effective and cheaper administration of justice. The rule is enacted on ground of public policy.”*

10. Reverting to the case of the petitioner/defendant No.9, the entire petition is drafted as if this Court has to decide the objections filed to the report of the local commissioner by the petitioner/defendant No.9 herein. The order impugned itself notes that the report of the local commissioner is yet to be accepted. Thus, admittedly there is no finding either rejecting or accepting the report by the learned Trial Court. So long as the report of the local commissioner is pending consideration before the learned Trial Court, the practice of appointing more than one local commissioner for the same purpose without recording a finding as to the satisfaction or rejection of the report filed by the first local commissioner is not permissible under law.

11. The learned Trial Court could not have allowed the prayer herein for appointment of second local commissioner for the same purpose pending consideration of the first report submitted by the local commissioner.

12. The dismissal of the application under Order XXVI Rule 10 CPC by learned Trial Court, therefore, does not warrant any interference by this Court in exercise of its power under Article 227 of the Constitution of India.

13. Dismissed.

CM No.27964/2015

Dismissed as infructuous.

**PRATIBHA RANI, J.**

**MAY 09, 2017**

*‘hkaur’*