

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.2250 of 2018(O&M)
Date of Decision-13.11.2018

P.D. Gautam

... Petitioner

Versus

M/s Ansal Properties & Infrastructural Ltd. and another

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Suryakant Gautam, Advocate
for the petitioner.

None for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 19.02.2018 passed by Civil Judge (Junior Division), Panipat, vide which application filed by the plaintiff for allowing the building expert to enter into the premises for inspection so as to inspect the construction material used by the company and to find out the quality of construction material, wooden frame and to take all measurements of the wall including depth of foundation and also to take photographs.

[2]. The grievance of the plaintiff/petitioner in the suit for mandatory injunction is that the plaintiff by way of installments had already paid substantial amount to the defendant and the

defendant after allotment of the plot to the plaintiff has not supplied the site plan nor provided any opportunity to the plaintiff to make a physical inspection of the plot. The plaintiff has pleaded some incriminating facts in respect of reduction of area of plot without the consent of the plaintiff and other configurations thereby causing loss to the plaintiff. Plaintiff has also alleged that poor quality of material used in the construction is not in consonance with the agreed terms and conditions. In order to find out nature of construction and other configurations, the plaintiff sought to get the site inspected by way of expert for which he prayed for direction to the defendant to allow the building expert to enter into the premises for inspection.

[3]. The earlier application filed by the plaintiff was for appointment of Local Commissioner. Local Commissioner was sought to be appointed by the trial Court and the prayer was declined on the ground that the Local Commissioner cannot be appointed for the purpose of collecting evidence for the plaintiff.

[4]. Thereafter, application was filed by the plaintiff for inspection of site by his expert who will visit the site and ascertain the violation of terms and conditions, if any. The said building expert would be examined by the plaintiff in his evidence and the same shall be available to the defendant for cross-examination and his report would be subject to objection by the defendant as well.

[5]. The prayer was declined by the trial Court primarily on the ground that the prayer for appointment of Local Commissioner was dismissed by the trial Court on 11.05.2017 and the present application is similar to that of appointment of Local Commissioner.

[6]. I have considered the submissions made by learned counsel for the petitioner.

[7]. Appointment of Local Commissioner cannot be equated with the building expert nominated by the plaintiff for the purposes of inspection of the site in question. Only direction which is required from the Court is to direct the defendant to permit the building expert to inspect the site. The report, if any, prepared by the building expert would be subject to criticism by the defendant and evidentiary value of the same to be appreciated by the trial Court if the building expert comes in the witness-box. If prayer made in the application for direction to the defendant to keep the suit property open so as to allow the building expert to enter the premises for inspection for taking samples and the prayer in the application for appointment of Local Commissioner are correlated, the same would be found to be distinct in nature. The Local Commissioner was not supposed to comment upon the use of inferior material as the same was to be appointed by the trial Court. In the instant application, the building expert is not to be appointed by the trial Court, rather the

nominated person of the plaintiff would inspect the site and thereafter, he can be examined by the plaintiff as a witness. His report would be subject to criticism by the defendant and the evidentiary value of such evidence would be subject to lawful appreciation of the trial Court. The controversy of the present nature cannot be considered strictly on the parameters of Order 26 Rule 9 CPC, but the same can be considered under inherent powers of the Court under Section 151 CPC. Reference can be made to **Om Parkash Vs. Kishan Chand and others, 1996(3) RCR (Civil) 737** to the extent of considering the controversy not on the parameters of appointment of Local Commissioner only. The orders passed in exercise of discretion of the Court under Section 151 CPC are not amenable to appeal, rather the same can be tested in the revision petition. The inherent powers of the Court can be exercised in order to achieve ends of justice and therefore, consideration of the case on merit requires to be done.

[8]. In my considered opinion, visit of building expert cannot be equated with appointment of Local Commissioner, rather the building expert would be a person to be examined by the plaintiff himself and his report would be subject to judicial scrutiny and criticism. The credibility of the witness can be impeached by the defendant during course of cross-examination. At this stage, it cannot be equated with any concept of appointment of Local Commissioner. Secondly, the examination of building expert as a witness of the plaintiff does not require any

leave of the Court or appointment as such by the process of the Court. Building expert can be cited as a witness by the plaintiff in his substantive evidence. The only thing which is required is to seek permission or direction by the trial Court to the defendant to allow visit of such expert for the purposes of inspection of the site. The analogy as applicable in rent cases involving visit of expert to ascertain dilapidated condition of the premises can be applied. It does not amount to collect evidence by process of the Court. Application for seeking such direction came to be filed only after discovery of fact that the defendant has used inferior quality of material in the construction and the same requires scientific investigation and analysis for which the witness of the plaintiff would inspect the site. Only requirement is that the defendant would allow such a witness to inspect the premises. Such a prayer cannot be declined as the premises in question cannot be treated to be privileged site or information not be disclosed to anyone in terms of Sections 123 and 124 of the Evidence Act. No such involvement of public interest can be presumed in declining the prayer for inspection by a building expert.

[9]. In view of Section 45 of the Evidence Act, the opinion of building expert can be a relevant factor for determination of *lis* on merits. The Court has to form an opinion on a point of science or art. The opinion on the point by a person specially skilled in science or art, is a relevant fact which can be adduced as an evidence before the Court. Primarily, Section 45 of the Evidence

Act is used in the context of identifying the handwriting and fingerprint, but the use of words ‘science or art’ in the Section would enlarge the scope so as to cover opinion of the building expert in the context of nature of construction work done by the defendant. Such an opinion is always subject to lawful criticism by the Court and credibility of such witness can be impeached by the defendant during course of evidence. The relevancy of opinion in issue cannot be commented upon at this stage of litigation as the same would be tested at the threshold of admissibility, validity, veracity and evidentiary value at a later stage.

[10]. In my considered opinion, dismissal of present application at the very threshold of dismissal of application for appointment of Local Commissioner is not sustainable in law. Consequently, this revision petition is allowed. Impugned order dated 19.02.2018 passed by Civil Judge (Junior Division), Panipat is hereby set aside. Trial Court shall pass necessary order in directing the defendant to allow the building expert to enter the premises for inspection of the same on the date to be fixed by the trial Court after due notice to the parties. Normal consequences to follow.

13.11.2018
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether Reasoned/Speaking
Whether Reportable

Yes/No
Yes/No