

(245) IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.8705 of 2017
Pronounced on: 13.11.2018

Balwinder Singh and another Petitioners

Versus

Dilbag Singh and others Respondents

BEFORE: HON'BLE MR. JUSTICE B.S. WALIA.

Present : Mr. Surinder Garg, Advocate for the petitioners.
Mr. Vinod Khunger, Advocate for the respondents.

B.S. Walia, J.

[1] Challenge in the revision petition under Article 227 of the Constitution of India is to order dated 21.11.2017 passed by the learned Additional Civil Judge (Sr. Div.), Gidderbaha allowing the application filed by respondents/defendants for appointment of Local Commissioner to note down the physical features of the suit land.

[2] Brief facts of the case leading to the filing of the instant revision petition are that the petitioners/plaintiffs filed a suit for permanent injunction for restraining the respondents/defendants once for all from carving out any khal, laying any underground water pipe and also from making any culvert as also from dispossessing the petitioners/plaintiffs from land measuring 1 kanal 7 marlas comprised in Khewat No.315, Khatauni No.618, Rectangle No.122, Killa No.3/1 (0-9), 4/1 (0-9) and 5/1 (0-9) as per Jamabandi for the year 2012-13 situated within the revenue limits of village

[3] The respondents/defendants filed a written statement claiming that a false suit had been filed by the petitioners/plaintiffs as sanctioned 'pakka' water course was already running in the suit land and further that previously 'nakka' between killa Nos.16 and 17 of Rect. No.113 was there and the respondents/defendants were irrigating their land through water course between killa Nos.16, 17, 24 and 25 of Rect. No.122. It was further contended that the respondents/defendants had initiated proceedings before the Canal Department to take their turn of water at the point between killa Nos.6 and 7 of Rect. No.122 where 'pakka' khal already existed and that the petitioners/plaintiffs wanted to dismantle the water course under the garb of injunction and even they pleaded before Canal Department that turn of water and 'nakka' may not be given to the respondents/defendants as they had injunction of the Civil Court, therefore, to bring the true picture before the Court, it was necessary that a Local commissioner be appointed to note down the physical features of the suit land in order to prevent the petitioners/plaintiffs from dismantling the water course after the passage of time and for an effective and just decision of the case.

[4] Reply was filed by the petitioners/plaintiffs alleging that there was no khal between killa Nos.4/1 and 5/1 of Rect. No.122, therefore, the question of intention of the petitioners/plaintiffs to dismantle the alleged khal did not arise at all and further that now under the garb of appointment of Local Commissioner, respondents/defendants wanted to create evidence in their favour which could not be allowed as the same would cause prejudice to the petitioners/plaintiffs. Accordingly, a prayer for dismissal of the application was made. Reliance was placed by the learned counsel for the petitioners/plaintiffs on the decision in **Surinder Kaur v. Rawinder**

Singh, 2013 (3) CCC 279 (P&H) and A. Gopal Reddy v. R. Subramanyam Reddy and another, 2013 (3) CCC 185 (AP).

[5] The learned trial Court while observing that it was settled that a Commission could not be appointed to ascertain who was in actual possession of the spot but a Commission could certainly be appointed to ascertain what was the factual position at the spot. Learned trial Court observed that in the instant case, it had been alleged by the respondents/defendants that a sanctioned 'pakka' watercourse was already running in the suit land and further that previously 'nakka' between killa Nos.16 and 17 of Rect. No.113 was there and they irrigated their land through water course between Killa Nos.16, 17, 24 and 25 of Rect. No.113 and further that it was going between Killa Nos.4, 5 and 6, 7 of Rect. No.122 whereas on the other side the petitioners/plaintiffs had contended that there was no khal between killa Nos.4/1 and 5/1 of Rect. No.122, therefore, the aforementioned facts could be ascertained only through a spot inspection. In the circumstances, the learned Additional Civil Judge (Sr. Div.), appointed a Local Commissioner to ascertain the factual position at the spot by visiting the spot by giving prior notice to both the parties with respect to date and time of the visit.

[6] Learned counsel for the petitioners/plaintiffs contended that it was settled law that a Local Commissioner could not be appointed for the purpose of gathering evidence for either of the parties, therefore, the impugned order was legally unsustainable and liable to be set aside. In this context, reliance has been placed on a decision of this Court in **Sunil and others v. Suresh Kumar and others, 2017 (2) RCR (Civil) 882**. A perusal of the said decision reveals that the same was a case where application for appointment of Local Commissioner was dismissed and this Court held that

order refusing to appoint a Local Commissioner under Order 26 Rule 9 CPC was not revisable nor could such an order be interfered with under Article 227 of the Constitution of India. However, this judgment is not applicable in the facts of the case as the instant revision petition lays challenge to an order appointing a Local Commissioner.

[7] Per contra, learned counsel for the respondents/defendants has contended that a Local Commissioner could certainly be appointed to ascertain the factual position at the spot in order to enable the Court to arrive at a just decision in the matter and in view of the claim and counter-claim by the parties, the only way the factual position could be ascertained was through spot inspection. Reliance has been placed on a decision of this Court in **State of Haryana and others v. Development Strategies (I) Private Limited and another, 2009 (5) RCR (Civil) 795** wherein it was held that order appointing a Local Commissioner was not reviseable. Relevant extract of the aforesaid decision is reproduced as under:-

*“4. The order appointing local commissioner is also not revisable in view of the law laid down by this Court in the cases of **Pritam Singh v. Sunder Lal, 1991 (1) RRR 356; (1990-1) PLR 191; Niranjana Sinigh v. Satwinder Singh (2005-2) PLR 689 and Hari Om v. Manish Kumar, 2005 (2) PLR 690.**”*

[8] I have considered the submissions of learned counsel appearing for the parties. Order 26 Rule 9 CPC deals with the appointment of Commission to make local investigations. The same is reproduced as under:-

“Commission to make local investigations – In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any

matter in dispute, or of ascertaining the market-value of any property, or the amount of any meson profits or damages or annual net profits, the court may issue a Commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.”

A perusal thereof reveals that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute etc. it may issue a Commission to such a person as it thinks fit directing him to make such investigation and to report thereon to the Court.

[9] Admittedly, the Civil Suit is for restraining the respondents/defendants from setting up a khal and underground water pipes in the suit land whereas the stand of the respondents/defendants is that the khal and underground water pipes already exist in the suit land. Therefore, it is essential for a local investigation to be carried out for the purpose of elucidating the matter in dispute as to whether water khal and underground water pipes exist at the spot or not. Reference in this connection can be made to a decision of Hon’ble the Telangana and Andhra Pradesh High Court in case titled as **Bandi Samuel and another v. Medida Nageswara Rao, 2017 (2) CivCC 264** wherein it was held that the object of Order 26 Rule 9 CPC is not to assist a party to collect evidence where the party could procure the same but for elucidating any matter in dispute. It was further held that it would be necessary to appoint a Local Commissioner particularly when any amount of evidence in that regard may not help the Court in arriving at a correct finding as evidence in the particular facts and circumstances of the case would be available on the spot at the ground/field and that a situation such as that would definitely fall within the expression

“elucidating any matter in dispute” for avoiding adducing much of oral evidence which would not only be time consuming but would also ultimately be of no practical approach for accurate determination of the lis. Relevant extract of the aforementioned decision is reproduced as under:-

“7. The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute. There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of “elucidating any matter in dispute” in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of “elucidating any matter in dispute” to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the lis. No doubt, before appointing an advocate commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint

advocate commissioner to decide any real controversy between parties.”

[10] Having considered the submissions of learned counsel for the parties, I am of the considered view that since in the instant case there is a claim for restraining the respondents/defendants from installing water khal and underground water pipes, whereas on the other hand there is a stand of the respondents/defendants that the water khal and underground water pipes already exists, therefore, in the facts of the instant case it would be necessary to appoint Local Commissioner to ascertain the factual position at the spot and a situation such as the one in the instant case would definitely fall within the expression of the term “elucidating any matter in dispute”.

[11] In the circumstances, I do not find any infirmity with the order passed by the learned Additional Civil Judge (Sr. Div.), Gidderbaha allowing the application and appointing a Local Commissioner to ascertain the factual position at the spot.

[12] Accordingly, finding no merit in the Revision Petition, the same is dismissed.

(B.S. Walia)
Judge

13.11.2018
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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No