

entire suit premises admeasures about 2400 sq.ft., out of which, the defendant is in occupation of 1500 sq.ft. and rest is in occupation of the plaintiff. It is submitted that the plaintiff needs the whole of the suit premises for setting up a factory of corrugated boxes. It is an admitted position that for a factory of corrugated boxes, a minimum area of 2000 sq.ft. is required. On the other hand, it is the case of the defendants that the premises actually admeasure only 1700 sq.ft., out of which 1000 sq.ft. was in occupation of the defendants, whilst the remaining 700 sq.ft. area was in occupation of the plaintiff. The defendants prayed for appointment of a court commissioner for measuring the total area of the suit premises and the areas respectively in occupation of the plaintiff and the defendants.

4 It is clearly impermissible to appoint a commissioner for investigation of this nature. Such appointment is not warranted under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. A court commissioner cannot be appointed for collecting evidence on behalf of either parties. The exact area of the suit premises and areas respectively in occupation of the individual parties are directly in controversy before the court. No court commissioner can be appointed to either report or reflect on this controversy.

5 The judgements relied upon by the defendants have been properly analysed by the Appellate Bench of the court. The decisions in **Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development**

Co-operative Society¹ or Baliram Vs. Melaram² do not support the defendants' case that denial of commission amounts to preventing them from adducing the best evidence. The object of Order XXVI Rule 9 is not to assist a party to collect evidence, where the party can itself obtain such evidence. It is only when local investigation is necessary for elucidating a matter in dispute, where, from its peculiar nature, material could be obtained only at the spot, that commission can be issued for local investigation concerning a matter in dispute. Evidence which can be taken in court cannot be collected through local investigation. In the present case, it is very much possible for the parties to lead evidence of the total area as well as the areas respectively occupied by them of the suit premises. They may rely on plans or if necessary even appoint their own experts or valuers, have the areas measured and lead evidence of such experts/valuers; they cannot have a commissioner appointed by the court to either decide or report on the areas.

6 Accordingly, there is no merit in the challenge to the impugned order. The writ petition is dismissed.

(S.C. GUPTE, J.)

1 Appeal No.CRP 1594 of 1993 decided on 22.03.1996

2 Second Appeal No.269 of 1999 decided on 28.08.2002