

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No. 935 of 2018

Date of Decision: 29.05.2019

Tejbir and others

.....Petitioners

Vs.

Deep Chand

.....Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. A.K. Goel, Advocate,
for the petitioners.

Mr. Surender Saini, Advocate,
for the respondent.

AMOL RATTAN SINGH, J. (ORAL)

1. By this petition, the petitioners challenge the order passed by the learned trial Court [Civil Judge (Junior Division), Sonipat], dated 23.05.2017, by which his application seeking appointment of a Local Commissioner, to determine the “existing position of the street existing between the houses of the parties to the suit.”

It has been stated in the impugned order that the petitioners' contention being that he is using a passage in existence for the past 60 years to access his property and therefore there was a right of easement (of necessity), such contention was required to be proved by leading documentary evidence, and therefore no Local Commissioner could be appointed to collect a favourable piece of evidence.

2. Though learned counsel for the petitioner submits that, as already noticed above, that he has been using the passage for 60 years and other than by appointment of a Local Commissioner there is no method of determining whether there is an existent passage or not, and to fortify his submission he also wishes to rely upon certain judgments, in the opinion of this Court, this petition can be disposed of at this stage, with a direction to the trial Court that it would first determine on the basis of evidence led by the parties, as to whether there is any other alternative passage to the petitioners' property, and if no such passage is seen and there is no other method of determining as to whether a passage has actually been existent for a long time on the suit property, a Local Commissioner would be appointed by that Court, to determine the existence of the passage, as also possibly the time since it has been existent.

3 It is to be noticed that learned counsel for the respondent has submitted that a report of a revenue official (*Kanungo*) already being on record, in any case, no other Local Commissioner needs to be appointed.

Other than that, he naturally reiterates what is stated in the impugned order.

4. Learned counsel for the petitioners, on the other hand, counters the first arguments by submitting that the said report of the '*Kanungo*' is only in the context of measuring a particular '*Khasra*' number, with no observation made, whatsoever, as regards the existence of an old passage or not, and consequently, that report has no bearing on the claim of the petitioner.

5. It may also be noticed here that though there are judgments of this Court stating to the effect that in a revision filed even under Article 227 of the Constitution of India, this Court would not interfere with an order passed by the trial Court, either appointing or refusing to appoint a Local Commissioner, a

judgment of the Supreme Court in Haryana Waqf Court vs. Shanti Sarup and others (2008) 8 SCC 671, can be cited, wherein their Lordships held as follows:-

“Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.

The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per Para 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because the land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial court was wrongly rejected.

It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.

For the reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then decided the second appeal on merits. Accordingly, we set aside the judgment and decree passed in

the second appeal and the second appeal is restored to its original file.”

(Emphasis applied in this order only)

Therefore, if there is no option left but to appoint a Local Commissioner to determine the correctness or otherwise of the contentions of the respective parties to the *lis*, such Local Commissioner would be appointed by a Court.

6. Consequently, this petition is disposed of in terms of the direction given in paragraph 2 hereinabove.

In the meanwhile, as has already been stated in the accompanying petition, i.e. CR No. 1324 of 2018, *status quo* would be maintained by the parties during the pendency of the suit.

May 29, 2019
nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes
Yes