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

Date of decision: 2nd September, 2019.

+ **CM(M) 1288/2019**

MOHD. TAHIR

..... Petitioner

Through: Mr. S.K. Bhaduri, Mr. Rakesh Kumar
and Mr. Neetu Gupta, Advocates.
(M:9810439195, 9560850144)

Versus

KHWAJA SYED MOHD MEHDI NIZAMI

..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM APPL. 39224/2019 (for exemption)

1. Allowed, subject to all just exceptions. Application is disposed of.

CM(M) 1288/2019 & CM APPL. 39225/2019

2. The present petition challenges the order passed by the Id. District and Sessions Judge dated 14th May, 2019. The appeal was filed against the original order of the Additional Rent Controller (*hereinafter* 'ARC') dated 8th September, 2016.

3. The appeal and the original order arise out of the proceedings for eviction instituted by the Respondent/landlord (*hereinafter* 'landlord'). The landlord had originally filed an application under Order XXVI Rule 9 CPC which came to be decided on 27th March, 2014 in the following terms:

"1. Through this order I shall dispose of an application under Order XXVI Rule 9 read with section 151 CPC filed on behalf of petitioner for appointment

of Local Commissioner.

2. The petitioner herein has preferred a petition under section 14(l)(j) of Delhi Rent Control Act, 1958 on account of illegal and unauthorized construction being carried out by the respondent owing to which he seeks eviction of the respondent/tenant. This application has been filed for appointment of Local Commissioner who shall visit the site and file a report in regard to illegal construction carried out by the respondent in the suit property.

3. Application is vehemently opposed by the counsel for the respondent on the ground that prior to the filing of the present petition, the petitioner herein has filed a suit for permanent injunction against the respondent herein in respect of the same property in which MCD was made a party. The detailed reply has been filed by the MCD in the said suit. The certified copy of the reply of the MCD has already been filed by the respondent in the present case. No purpose will be served by appointing a Local Commissioner. The sole purpose of the petitioner is to delay the proceedings.

4. I have heard the arguments advanced by both the counsels and gone through the records annexed with the petition and written statement.

5. The case is at the stage of petitioner's evidence, I feel that at this stage, there is no need of appointment of Local Commissioner for the reason that the detailed report from the MCD is already on record and this application has been filed by the petitioner in order to delay the proceedings. The onus to prove that the unauthorized and illegal construction is carried out is on the petitioner who has to prove the same by leading evidence and the case is already at the stage of petitioner's evidence, the petitioner can prove this fact

by leading evidence to this effect. The discretion to appoint a Local Commissioner lies with the Court and I feel that there is no need for the appointment of Local Commissioner at this stage. Accordingly, application of the petitioner is dismissed.

6. Now to come up for PE on 25.04.2014. Advance copy of the affidavit of petitioner's witness be supplied to the respondent.”

4. Thereafter the matter continued to remain pending and currently, is stated to be at the stage of evidence. On 8th September, 2016, the ARC, in view of Section 36 of the Delhi Rent Control Act, 1958 (*hereinafter* ‘DRCA’) directed appointment of a Local Commissioner to prepare a site plan as also to obtain the dimensions, the nature of projection and the nature of construction etc. The operative portion of the said order reads as under:

“Sh. Sermon Rawat, Advocate, Mobile no. 9873935601 is appointed as a local commissioner. The local commissioner shall visit the tenanted premises and prepare a site plan of the two rooms of the tenancy as well as the terrace above the two rooms and also indicate whether any construction has been raised above the two rooms or whether any part of the adjoining construction is also directly above the two rooms. The site plan may indicate the location of any walls, pillars etc. on the terrace and their positioning viz-a-viz the tenanted rooms on the ground floor. The dimensions of the two rooms in the ground floor and the entire open terrace may also be provided. The extent of the alleged varandah on the terrace of the ground floor may also be provided. Nature of such projection, the temporary permanent nature of the construction, if any, found be also reported. Local commissioner shall also take photographs of the same. The petitioner/representative, one counsel on his behalf shall be entitled to participate in the

commission. Fees of the local commissioner is fixed at Rs.21,000/-to be borne by petitioner.

It is clarified that since the commissioner would be entering the residence of the respondent, care be taken that the privacy of the respondent and his family is respected. No one other than the local commissioner/photographer accompanying him shall be entitled to take any photograph or make videos. If any pardanasheen lady is present in the house, she may be given reasonable time to retreat before the commission is commenced.”

5. This order was appealed against by the Petitioner herein (*hereinafter ‘tenant’*). In the impugned order, the Id. Sessions and District Judge held that under Section 36 of the DRCA, an advocate cannot be appointed as a Local Commissioner or for conducting an enquiry or inspection, however, the appellate judge upheld the order dated 8th September, 2016 by holding that such a power may be exercised under Order XXVI Rule 27 CPC. Thus, the appeal was dismissed.

6. Mr. S.K. Bhaduri, Id. counsel for the tenant submits on the strength of the judgments of the Madras High court in ***Chinnathambi & Ors. v. Anjalai [C.R.P. (PD) 1721/2005, decided on 22nd September, 2006]*** and ***R. Justin Arulappa v. R. Xavier Arulappa & Anr. [C.R.P. (PD) 839/2009, decided on 1st September, 2009]*** that it is impermissible for the Court to collect evidence on behalf of any party and that this order would be in the teeth of the said judgments as it would, in fact, amount to the Court assisting a party in collection of evidence.

7. A perusal of the eviction petition itself shows that the case of the landlord is that the tenant has engaged in illegal and unauthorised construction on the roof of the ground floor i.e., the first, second and third

floor and stairs to the first floor. Ld. Counsel for the tenant submits that in another suit in respect of the unauthorised construction which was carried out, a decree has been passed that there was some unauthorised construction, however, the same is the subject matter of an appeal.

8. A perusal of the ARC order clearly shows that the ARC, at the stage of the tenant's evidence, is of the opinion that a Local Commissioner is required to be appointed in order for the Court to adjudicate the issues raised in the present eviction petition. Admittedly, the tenanted premises have been with the tenant for almost 40 years and the landlord may not have access to the entire property. The order of the ARC merely directs preparation of a site plan and inspection of the terrace by a Court Commissioner. If the same is required for effective adjudication of the issues raised in the petition, the ARC cannot be said to not have the power to appoint a Local Commissioner. The Id. District and Sessions Judge has in fact held that Order XXVI Rule 9 CPC permits the ARC to carry out such an inspection through a Local Commissioner in view of the fact that the latest position on site of a premises can be ascertained by taking photographs, etc.

9. The Court has considered the two judgments handed over by the Id. counsel for the tenant. It is usual for Courts to appoint a Local Commissioner to direct inspection as in several cases it is otherwise impossible to ascertain the actual position of the property. Accordingly, it cannot be said that in all cases the appointment of a Local Commissioner assists a particular party. Thus, no infirmity is found in the impugned order.

10. The Local Commissioner shall, however, carry out the Commission in the presence of both the parties' representatives. Notice shall be given by the Local Commissioner to both the sides. A copy of the report shall also be

furnished and if either party has any objections they can raise the same before the Id. ARC. Needless to add, if issues have been framed by the Id. ARC, the onus to prove the said issues would be on the party on whom onus has been placed by the Court.

11. With the above observations, the petition and pending application are disposed of.

12. Order *Dasti*.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 02, 2019/dj

