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

Date of decision: 4th December, 2019

+ **CM (M) 856/2016 & CM APPL. 31978/2016**

ROSHAN LAL

..... Petitioner

Through: Mr. P. S. Sharda and Mr. Kshitij
Sharda, Advocates. (M:9810077120)

versus

RAM NATH GARG

..... Respondent

Through: Ms. Runjita Das and Mr. Vishal
Meher, Advocates. (M:9953738402)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed challenging the impugned order dated 29th July, 2016 by which three applications, filed by the Respondent/Plaintiff (*hereinafter*, “*Plaintiff*”), have been disposed of by the Ld. Civil Judge. The main contest is in respect of the application seeking appointment of a Local Commissioner and the application for leading additional evidence.

2. The dispute arises out of a suit for possession filed by the Plaintiff – Shri Ram Nath Garg. The case of the Plaintiff is that he is the owner of the property bearing no.4/47, forming part of property No.605, area measuring 50 Sq. Yards out of Khasra No.780, min. situated in the area of village Chandrawali, Shahdara in the abadi of block No.4, Vishwas Nagar, Shahdara, Delhi-32 (*hereinafter*, the “*suit property*”). The case of the Plaintiff is that the Petitioner/Defendant – Shri Roshan Lal (*hereinafter*,

“Defendant”) is running a factory in property bearing no.4/48. Owing to the fact that the Defendant had requested for usage of property no.4/47, the same was given to the Defendant for use and occupation, however, the same was not vacated and hence, the suit for possession. The prayer in the suit reads as under:

“It is, therefore, prayed that this Hon'ble court may kindly pass a decree for eviction directing thereby the defendant to handover the possession of property no.4/47, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32, as shown red in the site plan filed herewith to the plaintiff, in the facts and circumstances of the case.”

3. In the written statement, the stand of the Defendant is stated as under:

“Reply to para. 2

In this paragraph the plaintiff has committed brazen perjury and a separate application under Section 340, Cr. P. C. read with sections 191, 199 and 181 of I.P.C. has already been moved separately. The plaintiff has averred in this paragraph that the defendant has been running a factory in the adjacent property, property No. 4/48, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32. The plaintiff has further averred that the defendant approached the plaintiff for a temporary place for a few days and the plaintiff has further averred that on the basis of such a request the plaintiff agreed to give the possession to the defendant for a few days subject to the defendant handing over the possession immediately on opening of a show-room by the defendant near Sarvaria Market, Shahdara, Delhi-32. The plaintiff has further averred that the defendant agreed nt to create any smoke screen in the matter in respect of premises No. 4/47, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32. The contents of this paragraph are denied because they

are absolutely false except to the extent that the premises in possession of the defendant bearing No. 4/48, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32 is in possession of the defendant. Premises described as 9/99, Bazar Gali, Near Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32 in this paragraph are not belonging to the defendant but belong to the major sons of the defendant who are running their own show-room there. Rest of the averments are denied since there is not an iota of truth about the same. The defendant at no point of time approached the plaintiff with a request to take possession of the alleged premises with a request to take possession of the alleged premises bearing alleged No. 4/47, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32. The defendant has continuously been in possession of the premises bearing No. 4/48, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32 and therefore was never in need of any other place as alleged by the plaintiff. In fact the plaintiff has made this false averment with the sole purpose of misleading the court and cheat the defendant whom he wishes to dispossess by abuse of the process of court. The plaintiff must be put to strict proof of his averments and once again the defendant humbly prays that the plaintiff has mischievously made up a proposition simply to harass the defendant and to succeed in his ulterior motive of buying tenanted property and after vacating the tenant sell the same at exorbitant price without having regard to the fact of the suffering likely to be caused to the defendant. It has always been to the knowledge of Smt. Savitri Sarvaria, the person from whom the plaintiff is alleged to have purchased the property allegedly bearing No. 4/47, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-32 (please see copy of legal notice dated 1.8.88 issued by the Advocate of Smt. Savitri Sarvaria w/o late Shri Pran

Nath Sarvaria) that the property bearing No. 4/48 has always been attempted to be defined as some other number and that the defendant was always in possession of the premises currently in possession of the defendant and that the defendant never received the possession of the current premises from the plaintiff at any point of time. In fact the plaintiff should be put to strict proof to establish that the property referred to by him as No. 4/47 is a different property than the one in possession of the defendant and bearing No. 4/48. Other than the property bearing No. 4/48 lawfully in possession of the defendant as tenant, there is no other property in possession of the defendant as alleged by the plaintiff which is a patent lie on the part of the plaintiff for which immediate action merits to be taken against the plaintiff as laid out in section 340, Cr. P.C.”

4. The suit was initially dismissed by the Trial Court in 2010. The said order of dismissal was appealed by the Plaintiff and vide the order dated 17th October, 2011 the Id. ADJ had remanded the matter back to the Civil Court. The relevant portion of the order of the Id. ADJ reads as under:

“Various other grounds have also been taken to challenge the claim of the appellant. Having heard the arguments from both sides and gone through the case file, it emerges that the trial court decided issue No. 3 in favour of plaintiff by holding that plaintiff is owner of property no. 4/47, Sarvaria market, Vishwas Nagar, Delhi. The area of suit property No. 4/47 is 50 sq. yds, which was purchased by plaintiff from Smt. Savitri Sarvaria on 13/12/23 vide sale deed Ex. PW1/1 and plaintiff also got the property mutated in his own name and proved the house tax receipt as Ex. PW ½. While deciding the issue No. 3 in favour of plaintiff, Ld. Tial court also observed that defendant did not challenge the sale deed of plaintiff with regard to suit property.

However, issue No. 1 has been decided in favour of defendant on the basis of oral evidence of witness. It emerges from the record that defendant is a tenant in possession of property No. 4/48. The evidence discussed in issue No. 1 shows that property No. 4/47 does not physically exist in that area in the vicinity of property No. 4/48. If Ld. Trial court has decided the issue No. 3 in favour of plaintiff then it is presumed that subject matter is very much in existence otherwise if the property No. 4/47 is contiguous/adjacent to tenanted property of defendant. If for argument sake version of plaintiff is believed for a moment in that eventuality, the evidence was not marshalled if 4/47 was amalgamated with 4/48. The sale deed Ex. PW 1/8 of 4/48 pm record mentions its area as 25 sq. yds. which was sold by Hari Singh to Pran Nath Sarvaria on 22/12/65. For deciding issue No. 1 in order to appreciate the submissions of appellant/plaintiff it as required that physical measurement of premises No. 4/48 under tenancy of defendant was done to rule out any possibility of amalgamation of premises No. 4/47 with premises No. 4/48. The same having not been done, it would be apt that without advertting to the merits of the case, it be remanded back to Ld. Trial court to dispose off the issues afresh after allowing the parties to lead additional evidence in this regard including the step of sending Local Commissioner again with Draftsman to the property No. 4/48 under the tenancy of defendant so that its area can be measured to rule out the possibility of its amalgamation with 4/47 and also to physically identify the premises No. 4/47 and take its physical measurement, then only the claim of the plaintiff that he had given his premises No. 4/47 on license basis to the defendant to use it temporarily can be appreciated in proper perspective in light of decision of Ld. Trial court to the effect that the plaintiff is the owner of property bearing No. 4/47, Sarvaria Market, Vishwas Nagar. Moreover, plaintiff has not claimed

that he had given the premises No. 4/47 on rent to defendant but his version is that it was on license basis only. So observations of Ld. Trial court on issue No. 1 and on other issues that it was on rent are misplaced. In the additional evidence the seller of property No. 4/47 and the landlord of tenant/defendant for property No. 4/48 can also be examined and joined in proceedings to be conducted by Local Commissioner to physically identify and point out the measurement of property bearing No. 4/47 and 4/48 respectively so that the case can be appreciated in right manner. As regards the observation of Trial Court that the plaintiff is at liberty to approach the rent court from the pleadings of plaintiff in spirit, it is not the case of the plaintiff that he has given the premises on rent.”

5. Thus, as per the above judgment, the parties were permitted to lead additional evidence, including seeking appointment of a Local Commissioner and draftsman to determine the property bearing no.4/48, which is claimed to be identified under the tenancy of the Defendant as also to ensure that the same is measured, in order to rule out the possibility of amalgamation with property bearing no.4/47. The crucial words in the order of the ld. ADJ is that the purpose of remanding back was to “to rule out any possibility of amalgamation of premises No. 4/47 with premises No. 4/48”. Thereafter, the Plaintiff moved applications for appointment of a draftsman and for appointment of a Local Commissioner. The same were dismissed as withdrawn. Thereafter, the present applications have been filed, which has been allowed and a Local Commissioner has been directed to carry out the following mandate:

“Accordingly, in view of the directions of Ld. ADJ, the application for appointment of Local Commissioner filed by the plaintiff is allowed and Mr. Muhammad

Salim. Chamber No. F-502, Lawyer Chamber, Karkardooma Courts, Delhi-110032. (mobile No. 9871450789) is appointed as Local Commissioner with direction to inspect the premises No. 4/47 and 4/48 after giving notice to both parties on date and time to be fixed by the Local Commissioner along with Draftsman and to do the following:-

- a) to measure premises No. 4/48, which is under the tenancy of the defendant.*
- b) to measure the premises No. 4/47 which is in possession of the plaintiff.*
- c) to prepare proper site plan of the two premises with the help of draftsman and*
- d) to give opinion on the basis of inspection as to whether there is any possibility of amalgamation of premises No. 4/48 with premises No. 4/47.*

The fees of the Local Commissioner is fixed at Rs. 6000/- to be borne by the plaintiff. The expenses of the draftsman is also to be paid by the plaintiff, but the same shall not be exceeded Rs. 4000/-. Therefore, plaintiff shall pay Rs. 10,000/- to the Local Commissioner before inspection and within three weeks from today. Local Commissioner to file his report on the next date of hearing.

As far as the relief of measurement of premises No. 4/41 is concerned, the said relief cannot be granted by the court as the owner and person in possession of the said premises cannot be got inspected unnecessarily by the Local Commissioner at the instance of the plaintiff. The application stands disposed of accordingly.

6. Ld. counsel for the Defendant submits that this order is in the teeth of an earlier order passed by the Trial Court on 4th January, 2013. In fact, he relies upon the said order to state that the Plaintiff was not permitted to lead evidence to rule out the possibility of amalgamation of the properties bearing nos.4/47 and 4/48. Thus, the present order, which is contrary to the

earlier order dated 4th January, 2013, is untenable.

7. It is further submitted that in FAO No. 67/2012, which was filed by the Defendant before the High Court, challenging the order dated 17th October, 2011 passed by the ADJ, a counter affidavit was filed by the Plaintiff, where it was clearly pleaded that there was no possibility of amalgamation of the two properties. Thus, the Plaintiff is bound by the said stand taken in the counter affidavit, and currently the mandate, which has been given to the Local Commissioner, cannot be given as per the Plaintiff's admitted stand in the counter affidavit.

8. On the other hand, Id. counsel for the Plaintiff has relied upon the remanding order of the Id. ADJ to argue that the Trial Court had clearly directed the remand in order to lead evidence, as also appointment of the Local Commissioner and also for ruling out of possibility of amalgamation of the two properties.

9. After hearing Id. counsels for the parties, as well as having perused the site plan, which is on record, it is clear that the main issue in this case is as to whether the Defendant is in occupation of any portion of the property bearing no.4/47 and if so, whether the Plaintiff is entitled to possession of the said property. In view of the defence taken by the Defendant in the written statement, that he has always been in the possession of the property bearing no.4/48 and the Plaintiff is not the owner of the property bearing no.4/48 and also the property referred to by the Plaintiff i.e. no.4/47 is of a different number, there is clear dispute as to the identity of the property about which the suit for possession relates to. There has to be a determination as to what is the exact extent of No. 4/48 and No.4/47 and if any part of 4/47 has been amalgamated or combined with 4/48 in order to

merge the identity of 4/47 into 4/48. This can only be done with the help of a draughtsman by taking actual measurements. This was the purpose of the order by which the suit was remanded for re-trial.

10. Thus, the mandate of the Local Commissioner, as per the impugned order, for carrying out the measurement of the property bearing nos.4/48 and 4/47, as also to prepare a site plan with the help of draftsman is upheld. However, the question arises whether the Commissioner can give an opinion on the basis of the inspection as to whether there is any possibility of amalgamation of the properties. Such an opinion by an Advocate Commissioner would not be possible or permissible, inasmuch as to the extent of conduct of measurements, even with the help of draftsman, there is no difficulty and the site plan can be prepared. The Local Commissioner cannot, however, give any opinion as to whether there is any amalgamation or not. The said issue would have actually to be adjudicated by the Court on the basis of the Commissioner's report and other pleadings and evidence on record. Accordingly, while upholding the order for appointment of the Local Commissioner, the Local Commissioner's mandate is restricted to (a), (b), (c) above and will not cover (d) of the impugned order.

11. However, the Local Commissioner, in the circumstances, ought to be assisted by a governmental authority. It is submitted that this property falls in the jurisdiction of the Municipal Corporation of Delhi. Since the property is failing within the jurisdiction of the MCD, it is directed that the concerned Asst Engineer (AE) in the MCD would be permitted to accompany the Local Commissioner in order to identify the property and assist the draftsman and/or Local Commissioner, for taking the actual measurements and for preparation of the report. The question as to whether or not there has been

amalgamation of the properties shall be decided as a part of Issue No.2, to be adjudicated by the Trial Court.

12. Insofar as the application for leading additional evidence is concerned, the Plaintiff wishes to summon the house tax records in relation to the suit property in order to establish as to what is the amount of house tax being paid in respect of the suit property. There is no infirmity in the said order. The Ld. ADJ vide order dated 17th October, 2010, had, in fact, permitted additional evidence to be led. Only the house tax record shall be produced as additional evidence.

13. No other application or argument is pressed. The petition and the pending applications are disposed of. The local commission, as directed by the Id. Trial Court and as modified by this order, shall be executed within a period of two weeks from today.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 04, 2019/dk