

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.456 of 2020

Date of Decision: 06.03.2020

Malwinder Singh

.....Petitioner

versus

Maninder Singh and others

....Respondents

CORAM : HON'BLE MR.JUSTICE AMOL RATTAN SINGH

Present: Mr. Ranjodh Singh Sindhu, Advocate,
for the petitioner.

Mr. Vikas Gupta, Advocate,
for the respondents.

AMOL RATTAN SINGH, J.

By this petition, the petitioner challenges the order of the learned trial court [Civil Judge (Senior Division), Tarn Taran], dated 16.10.2019, vide which his application under Order 26 Rule 9 of the CPC, seeking the appointment of a Local Commissioner, was dismissed.

2. The petitioner is a defendant in the suit filed by respondent no. 1 herein, seeking a declaration to the effect that he is the owner in possession of a plot measuring 5½ *marlas* bearing MC no. 8/48-A, more fully described in the plaint, which need not be really referred to for the purpose of this petition.

3. The application of the petitioner (copy Annexure P-3) was actually one in which he stated that in fact the suit property, though described to be a plot in the plaint, is actually a house in possession of the petitioner and his co-defendants and is divided into three parts, one part of which was in the possession of the petitioner, the other two parts being in the possession of two other co-defendants and that position would be made clear upon appointment

of a Local Commissioner.

4. Respondent no. 1-plaintiff filed a reply to the application denying that the suit property was a house in possession of the petitioner and his co-defendants, further stating that originally it was in the possession of one Surjit Kaur, wife of Kirpal Singh (the said Kirpal Singh being respondent no. 6 in the present petition and also defendant no. 6 in the suit), with her having sold the plot to the plaintiff, vide a registered deed dated 09.01.2015, for valuable consideration, and that no Local Commissioner could be appointed to assess possession on the spot and consequently, the application should be dismissed.

5. The trial court, after noticing the aforesaid facts, held that neither party could 'depute' a Local Commissioner to prove its case, with the defendants therefore necessarily having to prove their possession by way of other evidence, because appointment of a Local Commissioner for that purpose would mean actual collection of evidence.

It was further held that since it was the specific case of the defendants (including the present petitioner) that they are in possession of the suit property, therefore the onus actually lies upon them to prove that fact.

Consequently, the application was dismissed.

6. At the time when notice of motion had been issued on 29.01.2020, learned counsel for the petitioner had submitted that in the reply filed by the plaintiff to the application of the petitioner, he had stated that there was no house existent on the plot, which in fact was the only thing that was sought to be determined by the petitioner by appointment of a Local Commissioner.

7. Learned counsel for the respondent-plaintiff having thereafter put in an appearance, he firstly had pointed to the fact that the petitioners'

application was actually one by which he sought a report of a Local Commissioner to determine as to who was in possession of the suit property and consequently, the trial court had not erred in dismissing that application, it actually being one seeking to gather substantial evidence through such Commissioner.

He had next submitted that in fact, in the written statement filed by the petitioner, in reply to the plaint, he had not stated anywhere that any part of the suit property was constructed on or whether it was not constructed upon, and in fact even the site plan submitted before the trial court by the petitioner did not show any construction on the suit property.

8. Upon the aforesaid contentions having been raised, learned counsel for the petitioner had in fact, even on the last date of hearing, submitted that though the application seeking appointment of a Local Commissioner did state that the true position with regard to possession be determined by appointment of a Local Commissioner, however, the petitioner is not pressing for that at all and is only now seeking a demarcation of the entire property to show what part thereof is constructed upon and what part is vacant.

As regards whether or not the petitioner had taken a stand in the written statement as to whether the suit property was only a plot or there was any construction upon it, he sought time to determine the same, with the matter therefore been adjourned to 04.03.2020.

9. On that date, learned counsel for the petitioner had pointed to the written statement filed by the petitioner, in reply to the plaint, which is already on record as Annexure P-2, to submit that even in the first preliminary objection taken, the petitioner has stated that he (and other defendants) are in

possession of the “house in dispute, shown green” and that the adjoining house purchased by Bachan Singh son of Kapoor Singh, was shown in blue in the site plan attached.

10. Upon the aforesaid having been pointed out to learned counsel for respondent-plaintiff, he relied upon various judgments of this court to submit that a Local Commissioner cannot be appointed for the purpose of gathering any substantive evidence, one of such judgments being that of a Division Bench in **Pritam Singh and another** vs. **Sunder Lal and others** 1990 (2) PLR 191.

11. In rebuttal, learned counsel for the petitioner submitted that with the petitioner having completely given up his prayer seeking a Local Commissioners' report on possession of the property, he is confining it to only demarcation as to what part of the property sought by the respondent-plaintiff is constructed and what part is lying vacant, with a demarcation report to that effect to be submitted.

12. Having considered the aforesaid arguments, though I see no infirmity in the impugned order, inasmuch as it actually rejects the petitioners' application seeking appointment of a Local Commissioner to determine the question of possession, that actually been substantive evidence to be gathered by a Local Commissioner which cannot be ordered, and therefore has correctly been rejected by the trial court; however, with learned counsel submitting that with the written statement having specifically stated that the suit property is constructed upon and with learned counsel for the respondent-plaintiff also submitting (after that was pointed out to him by this court from the written statement as also from the site plan produced), that the contention of the petitioner-defendant is that the construction is very old, I see no reason to not

dispose of this petition with a direction that the petitioners' application as has been rejected, be treated to be one filed not seeking a report of possession of the suit property but simply one seeking demarcation of the suit property, with the Local Commissioner to make his report as to what part of the suit property was constructed upon and what part is vacant, as per such demarcation to be made, with, naturally, the said demarcation to be conducted in the presence of both parties.

13. As regards the judgment cited by learned counsel for the respondents, there can be no quarrel at all with the proposition that a Local Commissioner cannot be appointed to gather substantial evidence; however, as already discussed in detail, with the petitioner not seeking appointment of a Local Commissioner now to determine possession of the suit property but only for a demarcation showing as to what portion thereof has been constructed upon and what has not, in my opinion, it would not amount to gathering substantial evidence simply by way of a demarcation in the aforesaid terms, there being no other method of actually determining the same, as it had not been argued before this court by either side that actually any sanctioned plans etc. are required to be issued for raising any construction in the area concerned.

Of course had any such issue been raised by either side, that construction can only be by way of sanctioned plan, naturally the matter would have been different, but it is to be again noticed that even learned counsel for the respondents has not touched upon any such requirement.

14. The petition is consequently disposed of as per the direction given in paragraph 12 hereinabove, but with it again reiterated with emphasis that the Local Commissioner will not in any manner state in his report as to who is in possession (or not in possession), of any part of the suit property, which fact

naturally would be considered by the trial court wholly on the basis of other evidence led before it, and even if the Local Commissioner makes any such remarks qua possession over any part of the suit property, in his report, such remarks will be wholly discarded by the trial court, with it only to thereafter consider the correctness of the report in terms of the demarcation carried out by the Local Commissioner.

March 06, 2020
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(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes