

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR 5474/2016(O&M)

Date of decision: 14.12.2022

Sucha Singh

.....**Petitioner**

Vs.

Amarnath and others

.....**Respondents**

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Munish Gupta, Advocate for the plaintiff/petitioner.
Mr. Sandeep Bansal, Advocate with
Mr. Anubhav Bansal, Advocate for defendant no.2/respondent
no.2.

Nidhi Gupta,J.

Prayer in this revision petition is for setting aside the order dated 23.5.2016 (Annexure P-8) vide which application filed by the petitioner/plaintiff for appointment of a Local Commissioner has been dismissed.

Brief facts of the case are that the petitioner filed civil suit No. 38A of 7.4.2014 (Annexure P-1) against defendants/respondents seeking inter-alia, a) mandatory injunction directing defendant No. 3/ respondent No. 3 herein, for restoration of the passage marked as 'ABCD' in the site plan bearing Khata No. 14/20, Khasra No. 22/1/6, as per Jamabandi for the year 2007-2008, to its original position as allegedly the defendants/respondents herein had encroached upon the said passage which was originally 11' wide, and because of encroachment on the part of defendants/respondents has now been reduced only to 1-1/2 -2 feet and; b) for seeking possession against defendants 1 and 2/respondent nos. 1 and 2 herein, of the site marked as ADGH shown in red

colour in the site plan as being part of khata no. 14/20, khasra no. 22/1/6 by removal of four walls constructed by them and for permanent injunction restraining defendants 1 and 2 from creating any obstruction in the possession marked as ABCEFGH shown in red and yellow colour in the site plan bearing khata no.14/20, khasra no.22/1/6 as per jamabandi for the year 2007-2008.

The defendants appeared before the trial Court and filed their respective written statements. On the basis of pleadings of the parties, issues were framed. Parties were directed to lead evidence. In the meantime partition was conducted between the parties by A.C. 1st Grade, Garshankar, and passage was carved out and as per petitioner passage was provided to one and all. It is the case of the petitioner that since the suit is with regard to encroachment upon the passage, therefore, he filed an application before the trial Court to ascertain the actual and factual position on the ground. This application dated 1.10.2015 is Annexure P-6. In the said application it was prayed that '*Local Commissioner may be appointed to effect measurement and to report if site in dispute is part of Khasra No.22/1/6 or not*'. Reply was filed by defendant no.2 to the aforesaid application and it was averred therein that the plaintiff/petitioner himself had sold the land to defendants 1 and 2 through various sale deeds and himself gave demarcation and had himself got constructed their houses as per the sale deed. It was stated in reply that Defendant no.3 being real brother of the petitioner/ plaintiff, they had encroached upon passage in dispute in collusion with each other. Accordingly, a direction was sought against the plaintiff and defendant no.3 that they be directed to vacate the passage of defendants 1 and 2 by removing the poles and wire as per sale deed and as per partition.

By way of impugned order dated 23.5.2016, learned trial court dismissed the application of the plaintiff/petitioner seeking appointment of the Local commissioner on the ground that *'it is matter in dispute that which party has blocked the passage in dispute and this fact is to be established by way of evidence to be led by the parties. It is settled law that the court is not to collect evidence on behalf of any party. It is the parties who have to prove their case by leading evidence. At this stage no ground is made out to appoint Local Commissioner in this case. As such, present application deserves no merit and the same stands dismissed.'*

It is this order which is in challenge before this Court by way of present revision petition.

Learned counsel for the petitioner has vehemently argued before this Court that in the present case the only issue is with regard to the demarcation of the specific khasra to determine the extent of encroachment by the defendants. It is submitted that collection of evidence is with regard to cases where possession is in dispute. Admittedly in the present case the question to be determined is not whether the possession of any party exists on the spot or not. What is to be determined is existence of passage which is clearly reflected in the revenue record, and whether the same is encroached upon or not. It is submitted that in the present case parties are blaming each other for encroachment and appointment of Local Commissioner will only help in resolving the issue in hand and will not help the petitioner/plaintiff in any way, and is not an exercise to collect evidence. Learned Counsel, in this regard, relies upon judgment of this Court in **Banarasi Das v Sardha Ram and others**, **Law Finder Doc Id # 717054** where this court had allowed ascertaining of extent of encroachment by defendants by allowing the appointment of Local

commissioner. Relevant paras 4,5, 8 and 9 of the said judgment are reproduced hereunder: -

“4. Learned counsel for the petitioner argued that there is no dispute with regard to Khasra No. 122 and 123. Both the parties have a common boundary and to ascertain the extent of encroachment by the defendants on the site, the prayer for appointment of Local Commissioner was made, which was wrongly rejected by the Lower Appellate Court.

5. On the other hand, learned counsel for the respondent has argued that in a suit for possession, the question of possession cannot be ascertained by appointing a Local Commissioner. The parties have to lead their evidence to establish their possession.

.....

8. The ratio of the above mentioned judgments is directly applicable to the facts of the present case wherein there is no dispute that the petitioner and defendants are owners of Khasra No. 122 and 123 separately and the case of the petitioner was that the defendants had encroach some part of Khasra No. 122 by raising some construction and due to that, he filed an application to ascertain the extent of encroachment by the defendants on the site and the Lower Appellate Court should have allowed the application of the petitioner so as to get the demarcation done, as per Order 26, Rule 9 CPC.

9. In view of the above-mentioned judgments, order dated 19.11.2014 passed by the learned Addl. District Judge Yamuna Nagar at Jagadhari is set aside with a direction to the learned Additional District Judge Yamuna Nagar at Jagadhari to appoint a Local Commissioner and after getting a report from the Local Commissioner, proceed with the appeal pending before it”.

Learned counsel also refers to judgment of Hon’ble Supreme court in **Haryana Waqf Board v Shanti Sarup and others, 2008(8) SCC 671** wherein the Hon’ble Supreme court has held as follows: -

“2. This is an appeal filed by the Punjab Waqf Board who was the plaintiff in a suit for declaration and injunction. The High Court in the second appeal had summarily dismissed the appeal on the ground that the second appeal was concluded by the concurrent findings of fact arrived at by the courts below. From the judgment itself, it would appear that the Board had failed to prove that the respondents have encroached any land belonging to the

appellant-Board. In view of the aforesaid position, the second appeal was summarily dismissed by the High Court. In our view, the High Court ought not to have dismissed the suit summarily merely on the ground that the second appeal was concluded by the concurrent findings of fact. The dispute that was raised by the parties before the court was whether the respondent had encroached upon any land belonging to the appellant-Board. Therefore, it cannot be in dispute that the dispute was in respect of the encroachment of the suit land. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Civil Procedure Code 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 of the 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 unauthorised possession in respect of the suit land by them as per paragraph 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because 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.

3. For the reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then to decide 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. The High Court is requested to decide the second appeal in the light of the observations made hereinabove within six months from the date of supply of a copy of this order to it. The appeal is thus allowed. There will be no order as to costs”.

Reference is also made to judgment of this Court in **Raj Kumar v Tarlok Singh and others, Law Finder Doc Id # 1360256**, where, in para 9 of the judgment, a Coordinate Bench of this court held as under:-

“9. On the question of non-maintainability of a revision petition, undoubtedly in Harvinder Kaurs' case (supra), their Lordships held as follows:-

"8. In the light of the aforesaid observation, without dilating any more on this subject, the meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines or adjudicates some right or obligation of the parties in controversy. Thus, a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even after the satisfaction of the aforesaid test the power of revision would be exercisable by this court subject to the limitations put under sub-section (1) and the proviso to section 115 of the Civil Procedure Code.

9. Adverting to the facts of the present case, we find that the trial court has only rejected the application for the issuance of a commission on the ground that issue no.3 could be proved by producing the relevant record and that demarcation was not necessary. From these observations, it is clear that the learned Subordinate Judge did not decide any issue nor did he adjudicate for the purposes of the suit some right or obligation of the parties in controversy."

However, further ahead, in the penultimate paragraph of the judgment, it was observed as follows:-

"13. Before parting with the judgment, it may, however, be made clear that it cannot as a general rule be laid down that in no case a revision would lie against an interlocutory order passed under any other provision of Order 26, and that it would be on the facts of each case that it will have to be found out whether the interlocutory order against which a revision is sought to be filed, has adjudicated for the purposes of the suit some right or obligation of the parties in controversy or not."

Thus, it was made clear that non-maintainability of a revision petition against such an order could not be laid down as a general rule and where substantive rights or obligations of parties are decided by interlocutory order, a revision would be maintainable”

Per contra, learned counsel for the defendant no.2/respondent submits that the petitioner is misleading this Court inasmuch as suit for mandatory injunction is only against defendant no.3 whereas against defendants 1 and 2, the petitioner has filed suit for possession. It is submitted that therefore, qua defendants 1 and 2, petitioner is seeking relief of possession, which means that he is trying to collect evidence as owner which, cannot be permitted as per law. Counsel for respondent/ defendant no.2 refers to Annexure P-2 which is the written statement filed by him before the trial court and in particular para 3 thereof to submit that the petitioner had himself sold the land to defendants 1 and 2 through various sale deeds and had himself given the demarcation to the said respondents who had got constructed their houses

as per sale deed, however, now petitioner in connivance with defendant no.3 has encroached upon the passage in dispute, which passage actually was given to defendant nos. 1 and 2 as per sale deed executed by the petitioner. It is alleged that the petitioner had filed a false suit in connivance with the defendant no.3 to bypass the stipulation of the sale deed executed by him in favour of defendant nos. 1 and 2. Accordingly, a direction was sought that the petitioner and defendant no.3 be directed to vacate the passage of defendant no.2 which they had encroached upon in connivance with each other by affixing wires and poles in the passage and it was further stated that the petitioner is bound to give passage to defendant no.2 as per sale deed. It is further submitted that the partition has already been carried out and the passage has been carved out by the AC 1st Grade, Garhshankar. Therefore, the petitioner and defendant no.3 are bound to provide passage to defendants 1 and 2 who have no other passage except the one blocked by the petitioner and defendant no.3 by encroaching thereupon. It is submitted that the hidden agenda of the petitioner is to seek possession and bypass the sale deeds and seek possession of the disputed passage as owner. It is submitted that this is not a public passage but is in the ownership of respondent/defendants 1 and 2 which the petitioner now wants an opportunity to demarcate in order to get ownership of the passage back to himself. In support counsel for the defendant no.2/respondent no.2 relies upon two Division Bench judgments of this Court being **AIR 1979 (P&H) 76 Smt. Harvinder Kaur and another v Godha Ram and another**; and **Pritam Singh and another v Sunder Lal and others, CR 1157 of 1987 decided on 25.4.1990**, wherein this Court has unequivocally held as follows:-

5. The reason given by the learned Single Judge for re-consideration was that this Court earlier in *M/s. Sadhu Ram Bali Ram v. M/s. Ghansham Dass Madan Lal, AIR 1975 Punjab and Haryana 174*, held that a revision against an order refusing to change the onus of an issue would be competent.

Though this case was noticed by the earlier Division Bench in *Harvinder Kaur's* case (supra) yet the learned Single Judge distinguished it on facts. According to the learned Single Judge if the order refusing to change the burden of proof can be said to result in adjudication upon some rights between the parties, it is difficult to subscribe to the view that an order declining the right of appointment of a Commission would not result in the adjudication upon any right of the parties. It was further observed that so far as the identity of a property was concerned, a party possibly cannot lead any evidence except by getting a commission appointed to demarcate the land at the spot. No amount of oral evidence can be a substitute for the report of the Commission.

6. After going through the judgments cited in the reference order, we do not find that the earlier judgment in *Harvinder Kaur's* case (supra) requires any re-consideration. The order refusing to appoint a Local Commissioner does not decide any issue, nor adjudicates rights of the parties for the purpose of the suit and is, therefore, not revisable. The distinction sought to be made by the learned Single Judge in view of the Judgment in *M/s. Sadhu Ram Bali Ram's* case (supra) clearly noticed by the Division Bench in *Harvinder Kaur's* case (supra) and it was observed, -

"It may be observed that the facts of *M/s Sadhu Ram Bali Ram's* case were different as in that case the onus of an issue had been wrongly placed and while deciding that question, it was held that such an order would be revisable."

Apart from that, placing the onus of an issue has something to do with the rights of the parties whereas refusing to appoint a Commission under Order 26 Rule 9, Civil Procedure Code, has nothing to do with the rights of the parties as such. It is the discretion of the Court to appoint a Commission thereunder and if the Court refuses to appoint a Commission, then no right of any party can be said to be prejudiced as such".

Learned counsel also refers to judgment rendered by the Hon'ble Patna High Court in **Sri Awadh Kishore Singh and another v Sri Brij Bihari Singh and others**, Law Finder doc Id # 150608. Paras 15 and 16 of the said judgment read as under:-

"15. In my view, after amendment in Section 115 of the Code for interference with an order in exercise of revisional jurisdiction, three conditions must be fulfilled, firstly, that the case comes within any of the three clauses of Sub-section (1) of Section 115 of the Code; secondly, that against the order impugned, no appeal has been provided either to the High Court or to

any Court subordinate thereto, and, thirdly, that the order impugned should be such that if it had been made in favour of the party applying for revision, would have finally disposed of the proceeding/suit, or if the order impugned is allowed to stand, the same would occasion failure of justice or cause irreparable injury to the party against whom it was made. If any of these three conditions is not fulfilled, High Court cannot interfere with the order in exercise of its revisional jurisdiction.

16. Now I proceed to consider the merit of the impugned order. By the impugned order, the plaintiffs have been debarred from examining defendant No. 2 as a witness on their behalf, as no order was passed by trial Court for acceptance of written statement filed by this defendant. No provision could be brought to our notice on behalf of any of the parties to show that a party is debarred from examining its adversary as a witness on his behalf. A plaintiff can examine any witness he so likes the witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected. Therefore, in my view, trial Court has committed material irregularity in the exercise of jurisdiction in debarring the plaintiffs from examining defendant No. 2 as a witness on their behalf”.

Learned counsel also relies upon recent judgment of this Court in **Deva Singh v Mohinder Singh and others, Law Herald (P&H) 1033** wherein the above view has been reiterated holding that no revision would be maintainable against an order dismissing the application for appointment of Local Commissioner.

I have heard learned counsel for the parties.

In the present case, diametrically conflicting claims have been made by the parties against each other, each alleging the other to be the encroacher. It has also been stated that the dispute/controversy in the present case is as to which of the parties has encroached upon the passage in question, and there is no dispute regarding possession. However, a perusal of the record

when viewed as a whole reveals that it is not a case of encroachment simpliciter. A perusal of the plaint shows that the petitioner has claimed the relief of possession against the respondent Nos. 1 and 2 – who, in turn are claiming ownership and possession over the suit land on basis of sale deeds and demarcation executed by the petitioner himself. Admittedly, partition too has already been conducted by the A.C. 1st Grade, Garshankar. As such, in my considered view, given the nature of the dispute, these are matters/ issues to be decided/ resolved on the basis of evidence to be led by the parties.

Further, voluminous case law has been cited by both sides in support of their submissions. However, in my respectful view, the facts of the relied upon judgment by the Hon'ble Supreme Court in case of **Haryana Waqf Board (supra)**, are distinguishable, inasmuch as in the said case there was no specific denial on the part of the respondents therein regarding the allegations of unauthorised possession in respect of the suit land by them. This is not so in the present case. The respondent nos. 1 and 2 herein / defendant nos. 1 and 2 have vociferously denied the petitioner's allegations of unauthorised possession, and have repeatedly stated that their possession over suit land emanates from sale deeds and demarcation executed by the petitioner himself.

Moreover, the underlying principle enunciated in the majority of case laws on the issue is that an order of the trial court refusing to appoint the Local Commissioner is not revisable. There is no doubt about the legal mandate that relief is to be given only when by the order under revision any issue has been decided, or rights of the parties have been adjudicated upon. There is no blanket bar as is also evident from a reading of Para 13 of **Harvinder Kaur's (supra)**. However, as cautioned therein, such discretion has to be exercised in the facts of each case, on determination whether the interlocutory order against which

revision is sought, has adjudicated for the purposes of the suit some right or obligation of the parties in controversy. This is not so in the present case. Thus, no interference by this Court is called for at this stage.

It is therefore, reiterated that in the facts and circumstances of the present case, the report of a Local Commissioner cannot be substituted for the evidence that is to be presented by the parties in support of their contentions; especially in view of the fact that according to the petitioner the issue in the present case is whether the passage in Khasra No. 22/1/6 is encroached upon or not and therefore, appoint Local Commissioner for demarcation; whereas as per the respondents the issue is that the passage is not a public passage and has already been sold to them by the petitioner. As such, the submission on behalf of the petitioner to the effect that a report in this case will not amount to gathering evidence and will only help to resolve the issue, is misplaced.

Accordingly, for the reasons stated above, this revision petition is dismissed, and the impugned order dated 23.5.2016 (Annexure P-8) is upheld.

Application(s),if any, also stand disposed of.

(Nidhi Gupta)
Judge

14.12.2022
Joshi

Whether speaking/reasoned

Yes

Whether reportable

Yes/No