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

+ CM(M) 142/2019 & CM APPL.3786/2019

RAJIV SIKKA & ANR Petitioners

Through: Mr. Sanjay Gupta and
Mr.Dharmesh Kapoor, Advs.

versus

ASHOK KUMAR JAIN Respondent

Through: Ms.Shweta Bari, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **07.09.2022**

1. This petition is, in my view, a complete misuse of Article 227 of the Constitution of India. Petitions such as this clog the board of this Court, resulting in cause lists running into close to a hundred matters every day. It is also a matter of regret that a matter so insubstantial has remained pending for three years as on date.

2. The impugned order dated 28th November 2018, passed by the learned Administrative Civil Judge (the learned ACJ) in CS 133/16 (*Ashok Kumar Jain v. Rajiv Sikka*) merely appoints a local commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (CPC).

3. Order XXVI Rule 9 of the CPC reads thus:

“9. Commissions to make local investigations –



In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

4. CS 133/16, in which the impugned order has come to be passed by the learned ACJ, was instituted by the respondent against the petitioner for a decree of mandatory injunction directing the petitioner to remove constructions in the suit property located at N-67, First Floor, Munshi Lal Building, Connaught Circus, New Delhi-110001, which, according to the respondent (as the plaintiff in the suit) were unauthorised.

5. During the pendency of the suit, the respondent moved an application under Order XXVI Rule 9 of the CPC, seeking appointment of a local commissioner to investigate the condition of the suit property, *inter alia* to ascertain the nature of the constructions present thereon.

6. The petitioner opposed the application. It was contended by the petitioner, before the learned ACJ, that no local commissioner could be appointed at a stage when evidence was yet to be led in the matter.



It was also contended that the report of the local commissioner, even if it were to be obtained, could not be treated as evidence.

7. The learned ACJ has repelled the contentions of the petitioner. The learned ACJ holds, in the impugned order, that, as the parties were at issue with respect to the nature of construction in the suit property, the appointment of a local commissioner to ascertain the actual physical status of the suit property, so as to identify the actual parameters of dispute, was necessary. The learned ACJ has also acknowledged the position that a report of a local commissioner was not evidence and that no local commissioner could collect evidence for either of the parties. For the aforesaid reason, even while directing the local commissioner to visit the suit property and take photographs of the construction thereon, the learned ACJ clarified that the local commissioner was not empowered to make any enquiry as to whether the alleged constructions were illegal or lawful or even as to the persons who had erected the said constructions. The learned ACJ has correctly acknowledged that these aspects were matters to be decided consequent on trial by the Court.

8. The relevant passages from the impugned order, in the above context, may be reproduced thus:

“At the outset, the law is well settled that a Local Commission can be appointed even in a suit for injunction. In the present case, the plaintiff in para No. 13 of the plaint has alleged that the defendant had covered the open courtyard, constructed parchatti on all the four walls of the room and made extension of 6 ft. x 3 ft. in the suit premises which is an unauthorized construction/addition/alteration/extension and is against the contract of lease as well as against the law of land. In the



corresponding para of 13 of written statement, defendants have denied that they have made any illegal or unauthorized construction and have stated that the premises was in the same condition as it was at the time of letting. The written statement is in fact silent on the aspect whether any such construction even exists or not.

The perusal of rent-deed filed on record shows that there is no mention of existence of any covered open courtyard, construction of parchatti on all the four walls of the room and any extension of 6 ft. x 3 ft. in the suit premises. *Under such circumstances, prima facie there appears to be a valid ground for appointment of local commissioner to verify the existence of mezzanine floor.*

Hence, in order to ascertain the actual physical status of the suit premises in dispute, so that trial can be conducted only on disputed facts, in my considered opinion, local commissioner should be appointed in this case. Local commissioner can visit the spot and take photographs of the nature and extent of alleged construction as it will not be possible for plaintiff to visit the spot and do the same as property is in possession of defendant. It is also settled law that local commissioner's report is not an evidence nor can he collect evidence. Hence, it needs to be clarified that the local commissioner cannot make inquiry with respect to the fact that whether the covered open courtyard, construction of parchatti on all the four walls of the room and extension of 6 ft. x 3 ft., if it exists, has been illegally constructed or lawfully constructed and by whom, as these facts have to be decided by the Court on the basis of evidence led by the parties. With these observations, application under Order 26 Rule 9 CPC stands allowed."

(Emphasis supplied)

9. Apropos the contention of the petitioner that no local commissioner could be appointed at a stage when evidence was being recorded, the learned ACJ notes that there was no such proscription, to



be found in Order XXVI Rule 9 of the CPC. He has also placed reliance, in this context, on the judgment of the High Court of Madras in *Saraswathy v. Viswanathan*¹.

10. Mr. Gupta, learned Counsel for the petitioner, raises four contentions, by way of contest to the impugned order. The first is that the learned ACJ ought not to have appointed a local commissioner at a stage when evidence was yet being led. The second is that the report of the local commissioner would serve no purpose, as it is not evidence. The third is that the learned ACJ was effectively obtaining evidence in favour of the respondent, through the local commissioner. The fourth is that the reason for appointing the local commissioner, as reflected in the concluding paragraph of the impugned order, i.e. that it was not possible for the plaintiff (i.e. the respondent) to visit the suit property as it was in the possession of the petitioner, was incorrect as, shortly prior to the appointment of the local commissioner, the respondent had in fact visited the suit property, in terms of an order passed by the learned ACJ in that regard.

11. None of these contentions, in my considered opinion, make out a case for interfering with the impugned order in exercise of the jurisdiction vested in this Court by Article 227 of the Constitution of India.

12. The learned ACJ has correctly held that Order XXVI Rule 9 of the CPC does not place any embargo, regarding the time or stage of

¹ 2002 SCC OnLine Mad 182



proceedings at which a Court could appoint the local commissioner. There is no principle, known to law, or finding place in the CPC or in any other cognate legislation that a local commissioner could be appointed only after recording of evidence was complete. In fact, in a case where the dispute relates to the nature of construction in the suit property, with the plaintiff asserting that the construction was erected by the defendant and was unauthorised and the defendant asserting *per contra*, it would be advisable that, if a local commissioner is appointed to ascertain the ground situation, that exercise is undertaken as early as possible, so as to avoid the chance of the ground situation changing during the pendency of the litigation.

13. No exception, therefore, can be taken to the decision of the learned ACJ to appoint a local commissioner to ascertain the status of the construction in the suit property.

14. The learned ACJ has himself acknowledged that the local commissioner cannot collect evidence. The apprehension, of Mr. Gupta, that the local commissioner may collect evidence in favour of the respondent is, therefore, misguided. It goes without saying that it would always be open to either party to contest the admissibility, relevance or correctness of the report of the local commissioner, during further proceedings in the trial, by all means known to the law. The mere obtaining of a report from the local commissioner does not, in any manner, prejudice either of the parties.

15. The learned ACJ has also protected the interests of both parties



by restricting the agenda of the local commissioner to taking of photographs of the construction in the suit property. He has clarified that the local commissioner would not make any enquiry on the issue of whether the construction was legal or illegal or regarding the person who had erected the said construction. Quite obviously, the only anxiety of the learned ACJ was to ensure that the ground position, as on the date of appointment of the local commissioner, was made known to the Court, as the parties were at issue thereon.

16. It is extremely unfortunate that, owing to the pendency of this completely misguided litigation before this Court for three years as on date, this hope of the learned ACJ may stand considerably defeated.

17. The impugned order is plainly discretionary in nature. The jurisdiction vested with the Court under Order XXVI Rule 9 of the CPC is a discretionary jurisdiction, to be exercised by the court *ex debito justitiae*, and to ascertain the true factual situation. Such a discretionary order cannot be challenged under Article 227 of the Constitution of India, except where the exercise of discretion is manifestly perverse. Ordinarily, an order appointing a local commissioner would not be perverse, so that such an order, in my view, can hardly constitute the basis for a proceeding under Article 227 of the Constitution of India.

18. In this context, one may reproduce the following passages from *Estralla Rubber v. Dass Estate (P) Ltd.*², *Garment Craft v. Prakash*

² (2001) 8 SCC 97



Chand Goel³ ; Puri Investments v. Young Friends & Co.⁴ which set out, clinically, the scope of Article 227 jurisdiction:

Estralla Rubber¹:

“7. This Court in ***Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand⁵*** in AIR para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case ***Waryam Singh v. Amarnath⁶***. This Court in ***Bathutmal Raichand Oswal v. Laxmibai R. Tarte⁷*** has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order.”

Garment Craft²

“15. Having heard the counsel for the parties, we are clearly of the view that the impugned order [***Prakash Chand Goel v. Garment Craft⁸***] is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or

³ 2022 SCC OnLine SC 29

⁴ 2022 SCC OnLine SC 283

⁵ AIR 1972 SC 1598

⁶ AIR 1954 SC 215

⁷ AIR 1975 SC 1297

⁸ 2019 SCC OnLine Del 11943



even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. [*Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar*⁹] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

16. Explaining the scope of jurisdiction under Article 227, this Court in *Estralla Rubber v. Dass Estate (P) Ltd*¹ has observed : (SCC pp. 101-102, para 6)

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not

⁹ (2010) 1 SCC 217



apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

Puri Investments³

“14. In the case before us, occupation of a portion of the subject-premises by the three doctors stands admitted. What has been argued by the learned counsel for the appellant is that once the Tribunal had arrived at a finding on fact based on the principles of law, which have been enunciated by this Court, and reflected in the aforesaid passages quoted from the three authorities, the interference by the High Court under Article 227 of the Constitution of India was unwarranted. To persuade us to sustain the High Court's order, learned counsel appearing for the respondents has emphasized that full control over the premises was never ceded to the medical practitioners and the entry and exit to the premises in question remained under exclusive control of the respondent(s)-tenant. This is the main defence of the tenant. We have considered the submissions of the respective counsel and also gone through the decisions of the fact-finding fora and also that of the High Court. At this stage, we cannot revisit the factual aspects of the dispute. Nor can we re-appreciate evidence to assess the quality thereof, which has been considered by the two fact-finding fora. The view of the forum of first instance was reversed by the Appellate Tribunal. The High Court was conscious of the restrictive nature of jurisdiction under Article 227 of the Constitution of India. In the judgment under appeal, it has been recorded that it could not subject the decision of the appellate forum in a manner which would project as if it was sitting in appeal. It proceeded, on such observation being made, to opine that it was the duty of the supervisory Court to interdict if it was found that findings of the appellate forum were perverse. Three situations were spelt out in the judgment under appeal as to when a finding on facts or questions of law would be perverse. These are: —

- (i) Erroneous on account of non-consideration of material evidence, or



- (ii) Being conclusions which are contrary to the evidence, or
- (iii) Based on inferences that are impermissible in law.

15. We are in agreement with the High Court's enunciation of the principles of law on scope of interference by the supervisory Court on decisions of the fact-finding forum. But having gone through the decisions of the two stages of fact-finding by the statutory fora, we are of the view that there was overstepping of this boundary by the supervisory Court. In its exercise of scrutinizing the evidence to find out if any of the three aforesaid conditions were breached, there was re-appreciation of evidence itself by the supervisory Court.

16. In our opinion, the High Court in exercise of its jurisdiction under Article 227 of the Constitution of India in the judgment under appeal had gone deep into the factual arena to disagree with the final fact-finding forum.”

19. In *Sadhana Lodh v. National Insurance Co. Ltd.*¹⁰, the Supreme Court has encapsulated the scope of Article 227 jurisdiction in the following passage:

“7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.”

20. The limitations on the scope of Article 227 have been reiterated

¹⁰ (2003) 3 SSC 524



by the Supreme Court a recent decision, delivered on 13th May, 2022 in *Ibrat Faizan v. Omaxe Buildhome Pvt. Ltd.*¹¹ in para 28 of the report thus:

“28. The scope and ambit of jurisdiction of Article 227 of the Constitution has been explained by this Court in the case of *Estralla Rubber v. Dass Estate (P) Ltd*², which has been consistently followed by this Court (see the recent decision of this Court in the case of *Garment Craft v. Prakash Chand Goel*³). Therefore, while exercising the powers under Article 227 of the Constitution, the High Court has to act within the parameters to exercise the powers under Article 227 of the Constitution. It goes without saying that even while considering the grant of interim stay/relief in a writ petition under Article 227 of the Constitution of India, the High Court has to bear in mind the limited jurisdiction of superintendence under Article 227 of the Constitution. Therefore, while granting any interim stay/relief in a writ petition under Article 227 of the Constitution against an order passed by the National Commission, the same shall always be subject to the rigour of the powers to be exercised under Article 227 of the Constitution of India.”

21. In view of the aforesaid, this petition, which is completely misconceived, is dismissed. Pending application also stands disposed of.

22. I was inclined to impose costs in this matter. However, as there has been no stay of the proceedings before the Court below, I refrain from doing so.

C. HARI SHANKAR, J

SEPTEMBER 7, 2022/kr

¹¹ 2022 SCC Online SC 620