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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Date of decision: May 01, 2023

Balwant Singh and another

....Petitioners

versus

Ankit and others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:-** Mr. Ram Kumar Saini, Advocate for petitioners.

ARUN MONGA, J. (ORAL)

Revision petition herein *inter alia* is to set aside impugned order dated 13.04.2023 (Annexure P-6) passed by learned Additional Civil Judge (Senior Division), Hansi whereby application filed by petitioner-plaintiff for appointment of Local Commissioner, was dismissed.

2. Learned counsel for petitioner-plaintiff would contend that plaintiff filed a suit for separate possession by metes and bounds in respect of 1/4th share each of petitioner/ plaintiffs in the Gair Mumkin land measuring 1 Kanal 14 Marlas bearing Khewat No.5081//4581, Khatoni No.6023, comprising Khasra No.305//26 (1-14) situated at village Sainipura, Tehsil Hansi, District Hisar, as per Jamabandi for the year 2017-18 read with mutation No.29970; with consequential relief of permanent injunction restraining respondent/defendants from alienating, transferring, mortgaging, gifting or otherwise creating charge of third person on the specific portion of the suit land noted above or exceeding their share in the suit land and also from raising construction over any specific portion of the suit land and also from changing the nature of the suit land without partition detrimental to the rights and interests of petitioners. He would further contend that mutation of inheritance of share of respondents No.1 and 2 on the death of their father-Baljeet Singh has not so far been sanctioned. Aforesaid suit land is joint between the

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parties and its partition has not been taken place by orders from any court of competent jurisdiction, though petitioners requested respondents to do so. He would also contend that on 10.02.2023, respondents with the help of some labourers started making measurement in order to raise construction on the specific portion and exceeding their shares in the joint land with *mala fide* intent to grab valuable portion of joint suit land abutting main road. Petitioners were threatened upon their resistance to the aforesaid act of defendants.

2.1. Learned counsel would further argue that application under Order XXXIX Rules 1 and 2 of CPC filed by plaintiffs was declined vide order dated 15.02.2023. Being aggrieved, plaintiffs filed first appeal, which was allowed vide order dated 03.03.2023 directing respondents to restrain themselves from changing nature of suit property by raising construction thereupon till decision on aforesaid application.

2.2. Learned counsel further submits that petitioner-plaintiffs filed an application under Order XXVI Rule 9 read with Section 151 CPC for appointment of Local Commissioner to report about existing state of affairs prevailing at the spot alongwith photographs. Vide impugned order dated 13.04.2023 (Annexure P-6), learned trial Court dismissed aforesaid application. Hence, the instant petition.

3. Heard.

4. The reasons for dismissal of petitioner's application given in the impugned order *inter alia* are as under:-

“By virtue of present application, applicant/plaintiffs have sought appointment of LC so as to report about existing state of affairs at the spot. Plaintiffs have approached this court seeking a decree for separate possession by way of partition alleging that defendants have raised construction on the specific portion of suit land near main road and that too over and above their actual share in the suit land. As discernible from written statement filed by defendants, portion shown with red colour in the site plan annexed with written statement has been alleged to be in the possession of the plaintiffs. On the other hand, learned counsel for plaintiffs have denied said assertion of aforesaid red colour portion shown in the site

plan annexed with the written statement being in their possession. Thus, appointment of LC has been sought by applicant/plaintiffs in order to ascertain the fact as to which of the party is presently occupying the red colour portion shown in the site plan annexed with the written statement. Placing reliance on the copy of an electricity bill, learned counsel for plaintiffs had contended that said red colour portion is being occupied by the defendants as electricity meter is also in the name of defendant no.1 Ankit. Learned counsel for defendant no.1 had refuted said contention put forth by learned counsel for plaintiffs submitting that mere issuance of connection in the name of defendant no.1 Ankit is not determinative of the controversy as parties to the suit are admittedly co-sharers and it happens at times that electricity connection is issued in favour of a particular person with the concurrence of rest of the co-sharers.

Be it as it may, the proposed exercise which has been sought to be conducted by applicants is not for the purpose of bringing on record the existing state of affairs at the spot. Rather, appointment of LC has been sought in a way to ascertain the possession of the concerned party over portion shown with red colour in the site plan annexed with the written statement. It is well settled that agency of a LC cannot be resorted to for the purpose of collection of evidence and both the parties are duty bound to prove their respective pleadings by adducing their respective evidence. Even otherwise, venture which has been sought to be conducted by applicant by way of appointment of LC, shall not lead to any fruition as LC would be helpless in ascertaining the actual possession of the concerned party over relevant portion at the spot and same is required to be proved by respective parties by leading their evidence. Case law relied upon by learned counsel for plaintiffs is not applicable to the peculiar facts of the case keeping in view the aforementioned discussion. Accordingly, finding no merit in the application in hand, same stands hereby dismissed. Now to come up on 17.04.2023 for consideration on the injunction application.”

5. Considering the nature, facts and circumstances of the case, issuance of notice to respondent-defendants seems unnecessary and is, therefore, dispensed with.

6. Petitioner-plaintiffs in Civil Suit on first hand have taken stand that they have not carried any construction on the suit land while on the other hand, controverting the same, respondent-defendants in their joint written statement have denied the same. In fact, the stand taken therein is as below:-

“2. That the suit of the plaintiffs is not at all maintainable in the present form in as much as the defendants have been legally and lawfully occupying the land as per there shares and have been rightly raising construction over the same as per the mutual long coming possession and simultaneously the defendants as well as plaintiffs are

occupying the specific portion of the land in question as fully detailed in the enclosed site plan and as such the suit by one co-sharer seeking injunction against another co-sharer is not at all maintainable. The suit of the plaintiffs is also bad on account of non full filling of the provisions of Section 34 of the Specific Relief Act. Even otherwise as per law of equity when the plaintiffs themselves have already constructed there house since long on the part of this property then they cannot seek injunction against the other co-share who are also legally raising construction over there exclusively owned and possessed portion of the property.”

7. A bare perusal of above clearly reflects that what is in dispute is whether or not there actually exist any construction on the suit land. The same can only be determined by physically verifying the site in question. In the premise, since limited question is with regard to determination of existence of construction on the suit land, it would be appropriate and rather for better assistance to learned trial Court itself if the application seeking appointment of Local Commissioner under Order XXVI Rule 9 CPC filed by petitioners-plaintiffs, is allowed. For ready reference, Order XXVI Rule 9 CPC is reproduced herein below:

“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.”

8. Perusal of above rule clearly reflects that for the purpose of elucidating any matter in dispute, the Court may issue a Commission to make an investigation and give a report. As already noted that there is no gainsaying about settled proposition of law that under the garb of Order XXVI Rule 9 CPC, assistance of the Court should not be sought to collect any favourable evidence as onus of proof of their case lies on respective parties by adducing evidence at appropriate stage. But, in the present case, a report by the Local Commissioner

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would in fact help in effective adjudication of the issue and would not cause any prejudice to either side.

9. I may hasten to add that there is nothing on record to suggest that appointment of a Local Commissioner would result in creation of any evidence in favour of plaintiffs (petitioners herein).

10. No prejudice would be caused to opposite party in case prayer of petitioners for appointment of the Local Commissioner is allowed.

11. Kanungo in-charge of area, as per territorial jurisdiction, is appointed as Local Commissioner, who is at liberty to take assistance of local police, if warranted. The Local Commissioner shall also give prior notice to both the parties about his date and time of spot visit, measure and demarcate the suit property and make a report of actual position indicating existence of construction on the suit land. The proceedings shall be videographed and CD/Pen Drive of the same along with report shall be submitted before learned trial Court. Report be filed before learned trial Court as expeditiously as possible.

12. Petitioners shall bear the fee of Local Commissioner and incidental expenses including cost of the aforesaid process. A consolidated amount of Rs.7,500/- (all inclusive) shall be payable to the Local Commissioner in advance. Learned trial Court shall issue notice to the Local Commissioner accordingly.

13. Petition is allowed in above terms.

14. Pending civil miscellaneous application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

May 01, 2023

mahavir

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No