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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Date of decision: May 30, 2023

Gurnam Singh

....Petitioner

versus

Mohinder Singh and others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:-** Mr. Veneet Sharma, Advocate for the petitioner.

ARUN MONGA, J. (ORAL)

Petition herein *inter alia* is for setting aside impugned order 09.03.2023 (Annexure P-6) passed by learned District Judge, Tarn Taran whereby appeal filed by contesting respondents against order dated 22.08.2017 (Annexure P-3) passed by learned Civil Judge (Junior Division), Patti dismissing an application under Order XXI Rule 32 read with Section 151 of Code of Civil Procedure, 1908 (for short 'CPC') has been allowed. Matter has been remanded to learned trial Court for fresh decision on the application *ibid*.

2. Averments are that a suit was filed by respondents No.1 and 2-plaintiffs seeking injunction against blocking of the drain/ *nali* against petitioner-defendant along with other defendants. Defendants also filed a counter claim seeking injunction against digging/carving out of any *nali*/ drain/water outlet through house of counter claimant/defendants. Vide judgment/ decree dated 17.03.2011, counter claim was dismissed and suit of plaintiffs was decreed *inter alia* restraining defendants from blocking drain/*nali*.

2.1. On 19.03.2023, plaintiffs filed application (Annexure P-1) under Order XXI Rule 32 CPC alleging violation of decree of injunction and blocking of said drain/ *nali* by defendants. Vide an order dated 22.08.2017 (Annexure P-3), said

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application was dismissed by learned executing Court. Aggrieved, plaintiffs filed appeal against aforesaid order.

2.2. Vide impugned order dated 09.03.2023 (Annexure P-6), appeal was allowed and matter was remanded to learned trial Court for deciding application under Order XXI Rule 32 CPC afresh after appointing Local Commissioner requiring him to visit the spot after giving adequate notice and file report along with site plan regarding existing position at the spot.

3. Learned counsel for petitioner/defendant No.1 contends that Local Commissioner cannot be appointed to collect evidence on behalf of contesting respondents No.1 and 2/plaintiffs and also that powers of the Court cannot be delegated to a Local Commissioner. He would further canvass that contesting respondents did not even make any request for appointment of Local Commissioner before the learned Executing Court. Both the parties were granted ample opportunity to produce evidence before Executing Court. He further submits that contesting respondents No.1 and 2 cannot be allowed to fill up lacunae by way of appointment of a Local Commissioner for collecting and producing evidence on their behalf.

3.1. Learned counsel for the petitioner also contends that Order XXVI Rule 9 of CPC empowers trial Court to issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court in the matter of civil suits only and the same is not applicable in case of execution petitions. He would further urge that Executing Courts or for that matter Appellate Courts have no power to issue such Commission while enforcing/ executing a decree passed by learned trial Court and said procedure is alien to CPC.

4. I have heard learned counsel for petitioner and perused the record.

5. Argument raised by learned counsel for the petitioner that contesting respondents-plaintiffs have not made any prayer for appointment of Local Commissioner flies in the face of contents of application (Annexure P-5) moved by plaintiffs before the learned District Judge, Tarn Taran, specifically praying therein for

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appointment of Local Commissioner to make a report regarding actual and factual position of drain/ nali.

6. Insipid argument of learned counsel for petitioner that Order XXVI Rule 9 of CPC is not applicable in the execution proceedings is unsustainable in view of Order XXVI Rule 18A CPC which mandates that provisions of this Order shall apply to proceedings in execution of a decree or order. For ready reference, said provision is reproduced herein below:

“18A. Application of Order to execution proceedings.-The provisions of this Order shall apply, so far as may be, to proceedings in execution of a decree or order.”

7. Apart therefrom, impugned order dated 09.03.2023 passed by learned District Judge, Tarn Taran, is premised, *inter alia*, on the following reasoning:

“9. The moot point in the present appeal is the actual and factual position with respect to the drain/Nali qua which respondents-defendants have been restrained from blocking the same.

10. Order 21 Rule 32 CPC deals for enforcement of decree for permanent injunction and provides that where there is willful failure to obey the decree, the same may be enforced by detention of the defendant/JD in civil imprisonment or by the attachment of his property or by both. The decree against blocking of the drain/Nali marked as ABCD and shown in red colour in site plan Ex.P1, as proved in the main suit, has been passed in favour of appellants-plaintiffs. Appellants-plaintiffs now allege the blockage of the said drain/Nali by the respondents-defendants. However, the said prayer of appellants-plaintiffs has been rejected by the Executing Court with the observation that the exact point of blockage has neither been pleaded nor proved by the appellants-plaintiffs. The appellants-plaintiffs now crave the indulgence of the Court for appointment of Local Commissioner so as to report about the actual and factual position with respect to the said drain/Nali qua which there has taken place some blockage by the respondents-defendants.

11. Undoubtedly, in such like circumstances, the appointment of Local Commissioner, to make an independent report to the Court, regarding the existing position at the spot, becomes essential so as to resolve the dispute for all times to come. There is no denying the fact that decree holder is entitled to the fruits of the decree and if, for ensuring the enforcement of decree of the Court, the actual and factual position is required to be brought on record, a Local Commissioner may be appointed to report about the same. It would in deed have been desirable if the learned Executing Court i.e. court of learned CDDJ, Patti, had of its own appointed Local Commissioner for visiting the spot and for submitting a comprehensive report with respect to actual and factual position qua the drain/Nali in dispute.

12. Thus, upholding the right of appellants-plaintiffs to the appointment of Local Commissioner for reporting about the actual and

factual position regarding the drain/Nali at the spot, it is deemed fit to remand the matter to learned Trial Court with the direction to appoint Local Commissioner for giving detailed and comprehensive report about the existing position of the drain marked as ABCD shown in red colour in site plan Ex.P1 attached with the Trial Court file, who shall visit the spot after giving adequate notice to both the parties and shall file his report, alongwith site plan regarding the existing position at the spot, whereafter the Trial Court shall decide the matter afresh.

13. The impugned order is, therefore, set aside. The matter is remanded back to the learned Trial Court for deciding application under Order 21 Rule 32 CPC afresh after appointing Local Commission, who shall visit the spot after giving adequate notice and shall file his report, alongwith site plan regarding the existing position at the spot. Respondents-defendants shall be entitled to summon the Local Commissioner and to cross examine him viz-a-viz the report that may be submitted by the Local Commissioner.”

8. A bare perusal of above clearly reflects that what is in dispute is the existing position at the spot. The same can only be determined by inspecting and physically verifying the site in question. In the premise, since limited question is with regard to existing position at the spot, it would be appropriate and rather for better assistance to learned Executing Court itself if Local Commissioner is appointed to give his/her report with regard to existing position at the spot, which learned First Appellate Court has already done by remanding the matter to learned Executing Court for deciding application under Order XXI Rule 32 CPC afresh after appointing Local Commissioner.

9. Perusal of Rule 9 of Order XXVI CPC 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 would in fact help in effective adjudication of the issue and would not cause any prejudice to either side.

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10. 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 (contesting respondents No.1 and 2 herein).
11. There is no room for interference in the aforesaid valid reasons recorded by learned Court below.
12. No material irregularity in law or procedure has been committed by learned Court below, so as to exercise extraordinary revisional jurisdiction herein.
13. Dismissed.
14. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

May 30, 2023

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Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No