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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-3557-2023 (O&M)

Date of decision: June 02, 2023

Ramesh Kumar and others

....Petitioners

versus

Krishan Chander (now deceased) through LRs and others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:-** Mr. Arihant Jain, Advocate for petitioners.

ARUN MONGA, J. (ORAL)

Revision petition herein is to set aside impugned order dated 25.04.2023 passed by learned Civil Judge (Junior Division), Jind whereby application filed by defendants No.5, 6, 11, 12, 31, 32, 35, 36, 41, 42, 47 and 48 and LRs of 43 for appointment of Local Commissioner to visit the suit land and prepare site plan of existing position/construction at the spot, was dismissed.

2. Averments are that respondents No.1 to 3-plaintiffs filed a suit *inter alia* for partition by metes and bounds of *gair mumkin* land in question and for permanent injunction restraining defendants from occupying any specific portion/parcel of land in question and from raising any construction thereon forcibly, illegally either themselves or with the assistance of their agents, servants, employees, attorneys etc. till the same is partitioned by metes and bounds and further restraining defendants from alienating in any way any specific portion of aforesaid land.

2.1. Defendants No.5, 6, 11, 12, 31, 32, 35, 36, 41, 42, 47 and 48 and LRs of 43 filed an application for appointment of Local Commissioner. Vide impugned order dated 25.04.2023, aforesaid application was dismissed.

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3. Learned counsel for petitioners-defendants No.5, 11, 12, 31, 32, 35, 36, 41, 42, 43(b) and 47 would contend that appointment of Local Commissioner is necessary and required for just decision of the case, in view of facts and circumstances of present case. He contends that admittedly land in dispute is *gair mumkin* and a residential colony exist there and more than 100 houses are in existence. Further contends that in the year-1962, a residential colony in the name of Laxman Market Colony was carved out. Respondent-plaintiffs have concealed this fact. Though he has admitted that land in dispute is *gair mumkin* and plaintiffs and defendants are co-owners in possession, nature of land has already been changed by the predecessors of the plaintiffs and sale deeds have already been executed.

3.1. Learned counsel for petitioners also urges that respondent-plaintiffs have concealed material facts and submits that suit land is falling within the municipal limited of Municipal Committee, Julana and a colony by name of Laxman Market/ Colony exists on the land in dispute being an approved colony, and all the amenities like sewerage/ water supply, electricity are being provided and Municipal Committee is charging house tax upon constructions of houses.

4. Considering the nature of order being passed, facts and circumstances of the case, issuance of notice to respondents seems unnecessary and is, therefore, dispensed with.

5. I have heard learned counsel for petitioners and perused the case file.

6. Ordinarily, this Court refrains to accept the request for appointment of Local Commissioner under the garb of assistance of the Court to collect evidence/create evidence, which is non-existent. However, since in the present case, dispute is with regard to existing position on the land in question as it is admitted to be a *gair mumkin* land, to that limited extent physical inspection of land in question is relevant and will be of certain use and assistance to learned

Court below to determine the exact position on the land in dispute. To that limited extent, the request of defendants to seek appointment of Local Commissioner ought to have been accepted by learned Court below.

7. The reasons for dismissal of petitioners' application given in the impugned order *inter alia* are as under:

“5. By way of present application, the applicants are seeking appointment of Local Commissioner, to ascertain the existing nature of the suit land, especially the alleged construction raised over by the co-sharers. It is pertinent to mention here that in his plaint, the plaintiff has stated the suit land comprised in Khewat no. 480 Khata No.667 Rect No. 135 Killa No. 20(8-0) Rect No. 136 Killa No. 16(8-0), 17/1(4-0) situated in the revenue estate of village Julana, District Jind as Gair Mumkin/ non agricultural vide jamabandi for the year 2103-2014, however, as per jamabandi annexed alongwith plaint, the aforesaid suit land is stated as Nehri i.e. agricultural. Mere stating the suit land as Gair Mumkin and its consequent admission by the defendants do not amount to conversion of the nature of the suit land as the same is still reflected as agricultural in the revenue record. Although, the applicants have alleged that the existing nature of the suit land was converted to residential in the year 1965 and since then a colony has been carved out and several residential houses were constructed over the same, however, it is still for the plaintiff as well as the defendants to prove that the suit land is non-agricultural i.e. Gair Mumkin in nature. In the present application, applicants are seeking appointment of Local Commissioner for ascertaining the existing nature qua construction raised by co-sharers, which in-turn, is nothing except collecting evidence at the instances of the Court. It is settled law that, in a Civil Suit each party has to prove its case by leading their own evidence and no Local Commissioner could be appointed to collect evidence on behalf any party. Since it is yet to be proved on evidence that despite the revenue record reflecting the suit land as agricultural/Nehri, the nature of the suit land is non agricultural/Gair Mumkin. Therefore, no Local Commissioner can be appointed to ascertain the actual and existing nature of the suit land.

8. I am not in agreement with the aforesaid reasoning rendered by learned trial Court while dismissing the application of defendants for appointment of Local Commissioner. Petitioner-defendants specifically pleaded in the revision herein as well as in the application submitted before the learned trial Court that since 1962, residential colony exists on the land in question and plaintiffs have concealed the same from the learned trial Court. Also Municipal Committee concerned has provided certain amenities like sewerage/ water supply and

electricity connections etc. on the land in dispute. The short question for determination is the existing position on the land in question. In the premise, since a limited question is with regard to determination of existing position, it would be rather appropriate and of assistance to learned trial Court itself if application is allowed by appointing a Local Commissioner under Order XXVI Rule 9 CPC. 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.”

9. 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 after spot inspection by the Local Commissioner would in fact help in effective adjudication of the issue and would not cause any prejudice to either side. Ordinarily, this Court treads cautiously in such matters and would refrain to interfere, unless there is any extreme hardship. The case in hand does seem so and deserves indulgence.

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 defendants (petitioners herein).

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11. No prejudice would be caused to opposite party in case prayer of petitioners for appointment of the Local Commissioner is allowed.
12. In the premise, without commenting on contentions of learned counsel as noted hereinabove, impugned order is set aside. Application for appointment of Local Commissioner is allowed. Learned trial Court to appoint Local Commissioner to carry out physical verification of the land dispute. The Local Commissioner shall give prior notice to both the parties about his date and time of spot visit and make a report of actual position. The proceedings shall be videographed and CD/Pen Drive of the same along with report shall be submitted before learned trial Court. Learned trial Court shall also pass appropriate order regarding the fee of Local Commissioner and incidental expenses including cost of the aforesaid process, in accordance with law.
13. Revision is allowed accordingly.
14. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

June 02, 2023
mahavir

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No