

CR-3466-2022

[113] IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

CR-3466-2022

Date of Decision :20.01.2023

Kamal @ Kamal Khatri

...Petitioner

versus

Mahender Singh and another

....Respondents

Coram : Hon'ble Mr. Justice B.S. Walia

Present : Mr. Ajay Kumar Dahiya, Advocate for the petitioner.  
Mr. Parveen Sharma, Advocate for respondent No.1.

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B.S. Walia, J. (Oral)

[1] Challenge in the petition is to order (Annexure P-6) dated 17.05.2022 passed by the learned Civil Judge (Junior Division), Sonipat, allowing application (Annexure P-4) dated 10.09.2019 filed by respondent No.1-plaintiff (parties have wrongly been mentioned as plaintiff and defendants in the memo of parties), appointing a Revenue Official as Local Commissioner.

[2] A perusal of order (Annexure P-6) reveals that application was filed by respondent No.1-plaintiff on the plea that it was the admitted case of the parties that share of the plaintiff and defendants was 1/6<sup>th</sup> each in the total land which worked out to 529.79 sq. yd. per share and as per the pleading of the petitioner-defendant, he had carried out construction only over his own portion of the land but as per the version of the plaintiff, the defendants had encroached upon an area of 173.3 sq. yd. shown by letters ABFE in the site plan annexed with the plaint and that in order to resolve the controversy and to ascertain the actual and factual position of the suit property, it was necessary to demarcate the portion of

CR-3466-2022

the plaintiffs and defendants by appointing a competent Revenue Officer as local Commissioner.

[3] On the other hand, it was argued on behalf of the defendants that the plaintiff and defendants were co-sharers in the suit property and being co-sharers, the defendants had right over every inch of the land, although it was admitted that all co-sharers were owners of their respective shares and further that without partition, it was not possible to ascertain if the defendants had encroached upon any portion of any co-sharers in the suit property.

[4] Learned trial Court while taking into account admitted position between the parties that they were co-sharers in the suit property to the extent of 1/6<sup>th</sup> share each and the plea for appointment of local Commissioner to ascertain if the defendants were in possession of land more than their share, held that the plea of the defendants that without partition the claim could not be considered, was liable to be ignored, as it had been pleaded in the plaint that partition had already been effected through a family settlement besides plaintiff while claiming to be in exclusive possession of his share was alleging that the defendants were encroaching upon the plot of the plaintiff to the extent of 178.3 sq. yds., and that in the circumstances, the appointment of a local Commissioner was necessary to ascertain the actual state of affairs on the spot and to demarcate the land in dispute.

[5] Sole argument of learned counsel for the petitioner while relying on the decision of this Court in 'Ram Partap versus Gulpinder Singh and others', 2018(4) PLR 361 is that a local Commissioner cannot be appointed for collecting evidence on behalf of either of the parties

therefore, the impugned order is unsustainable.

CR-3466-2022

[6] *Per contra*, learned counsel for the respondents has relied upon the decision of this Court in '**Balwinder Singh and another versus Dilbag Singh and others**', 2019(1) RCR (Civil) 533.

[7] In '**Ram Partap's** case (supra), while noticing that the application for appointment of a local Commissioner had been dismissed and that in view of the decision in '**Banarsi Dass versus Sunita Rani @ Sarita Rani and others**', 2017 (2) RCR (Civil) 274, a local Commissioner could not be appointed at the behest of either of the parties to the suit for the purpose of collection of evidence and that refusal of prayer for appointment of a local Commissioner did not decide any right between the parties, the revision petition was dismissed in limini.

[8] On the other hand, perusal of decision in '**Balwinder Singh's** case (supra) reveals that while relying upon the decision in '**State of Haryana and others versus Development Strategies (I) Private Limited and another**', 2009(5) RCR (Civil) 795, as well as the provisions of Order 26 Rule 9 CPC, appointment of a local Commissioner was upheld on the ground that a local Commissioner although could not be appointed for the purpose of gathering evidence for either of the parties but local Commissioner could certainly be appointed to ascertain the factual position at the spot to enable the Court to arrive at a just decision in the matter and in view of the claim and counter-claim by the parties, the only way to ascertain the factual position was through spot inspection. Relevant extract of the same is reproduced as under:-

*“[7] Per contra, learned counsel for the respondents/defendants has contended that a Local Commissioner could certainly be appointed to ascertain the factual position at the spot in order to enable the Court to arrive at a just decision in the matter and in view of the claim and counter-claim by the parties, the*

CR-3466-2022

*only way the factual position could be ascertained was through spot inspection. Reliance has been placed on a decision of this Court in State of Haryana and others v. Development Strategies (I) Private Limited and another, 2009 (5) RCR (Civil) 795 wherein it was held that order appointing a Local Commissioner was not revisable. Relevant extract of the aforesaid decision is reproduced as under:-*

*"4. The order appointing local commissioner is also not revisable in view of the law laid down by this Court in the cases of Pritam Singh v. Sunder Lal, 1991 (1) RRR 356; (1990-1) PLR 191; Niranjan Sinigh v. Satwinder Singh (2005-2) PLR 689 and Hari Om v. Manish Kumar, 2005 (2) PLR 690."*

*[8] I have considered the submissions of learned counsel appearing for the parties. Order 26 Rule 9 CPC deals with the appointment of Commission to make local investigations. The same is reproduced as under:-*

*"Commission 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 meson 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."*

*A perusal thereof reveals that 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 etc. it may issue a Commission to such a person as it thinks fit directing him to make such investigation and to report thereon to the Court.*

CR-3466-2022

[9] Reference was also made to a decision of Hon'ble the Telangana and Andhra Pradesh High Court in case '**Bandi Samuel and another** versus **Medida Nageswara Rao**', 2017(2) CivCC 264, wherein it was held that the object of Order 26 Rule 9 CPC was not to assist a party to collect evidence where the party could procure the same but for elucidating any matter in dispute, that it would be necessary to appoint a Local Commissioner particularly when any amount of evidence in that regard may not help the Court in arriving at a correct finding as evidence in the particular facts and circumstances of the case would be available on the spot at the ground/field and that a situation such as that would definitely fall within the expression "elucidating any matter in dispute" for avoiding adducing much of oral evidence which would not only be time consuming but would also ultimately be of no practical approach for accurate determination of the *lis*. Relevant extract of the aforementioned decision is reproduced as under:-

*"7. The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute. There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of elucidating any matter in dispute in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate-commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the*

CR-3466-2022

*Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of elucidating any matter in dispute to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the lis. No doubt, before appointing an advocate commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint advocate commissioner to decide any real controversy between parties.*

[10] No point has been argued.

[11] In the light of the position noted above, especially that appointment of a local Commissioner would assist the Court in ascertaining the factual position on the spot as to whether the defendants are in possession of share more than their entitlement, moreover, in view of the decision in 'Pritam Singh's case (supra), Niranjan Singh's case (supra) and Hari Om's case (supra), order appointing a local Commissioner is not revisable, I am of the considered view that no interference is called for with the order appointing the local Commissioner. Petition dismissed.

**(B.S. Walia)**  
**Judge**

20.01.2023

'Rajneesh'

|                            |   |        |
|----------------------------|---|--------|
| Whether speaking/ reasoned | : | Yes/No |
| Whether reportable         | : | Yes/No |