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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-2932-2021 (O&M)

Date of Decision: 10.05.2023

Karam Singh @ Karamjit Singh

.....Petitioner

Versus

Harbhajan Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. A.P. Singh, Advocate
for the petitioner.

Mr. Chandeeep Singh, Advocate
for respondents No.1 to 3.

ARUN MONGA, J. (ORAL)

Petition herein, *inter alia*, is for setting aside order dated 23.09.2021 (Annexure P-1), passed by learned Civil Judge (Jr. Divn.), Samrala, whereby application dated 15.01.2020 (Annexure P-3) filed by petitioner/plaintiff under Order 26 Rule 9 CPC for appointment of Local Commissioner from revenue department i.e. Kanungo or Tehsildar, to visit the spot in question and to measure and make the detailed report and *Naksha Tafawat (Plan of Encroachment)* in accordance with law, was dismissed.

2. Succinct facts first, as pleaded in the instant petition.

2.1. Petitioner/plaintiff filed a civil suit for mandatory injunction directing respondents/defendants No.1 to 3 to remove the crop which was

cultivated by them and also to remove the encroachment on the suit property, which is a passage and to vacate the land measuring 0 Kanal 6 Marlas as per Jamabandi for the year 2005-2006.

2.2. Thereafter, petitioner/plaintiff moved an application for appointment of Local Commissioner from revenue department to make a detailed report and *Naksha Tafawat (Plan of Encroachment)* in accordance with law. Respondents/defendants No.1 to 3 filed a reply thereto. Ld. Trial Court dismissed the said application vide impugned order.

3. Learned counsel for petitioner would argue that Ld. Trial Court has wrongly observed that Local Commissioner cannot be appointed for fact finding purposes. In the facts and circumstances of the case, the appointment of Local Commissioner could not be said to be for collection of evidence. He would further argue that to prove the actual position and real facts of the case, the investigation has to be made on the spot by the Local Commissioner.

4. On the other hand, learned counsel appearing for respondents No.1 to 3 vehemently opposes the revision and submits that no fault can be found with the findings of Ld. Trial Court in view of the facts and circumstances of the present case.

5. While there is no quibble with the view taken by Ld. Trial Court that the burden of proving possession over the land is upon plaintiff (petitioner herein) and he cannot be allowed to create evidence by seeking indulgence of the Court to appoint a Local Commissioner. However, what has to be seen is the nature of controversy involved herein. The suit

involves the dispute with respect to the alleged encroachment on the suit land *qua* which plaintiff (petitioner herein) claims himself to be the owner. In the premise, since a limited question is with regard to encroachment on the land of the petitioner for which the demarcation needs to be carried out, it would be rather appropriate and of assistance to Ld. Trial Court itself if the 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.”

6. Perusal of the 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 the settled proposition of law that under the garb of Order 26 Rule 9 CPC the assistance of the Court should not be sought to collect any favourable evidence as the onus of proof of their case lies on the respective parties by adducing evidence at the appropriate stage. But, in the present case, a report by the Local Commissioner after the demarcation of land would in fact help in effective adjudication of the issue and would not cause any prejudice to either side.

7. In the parting, I may hasten to add that there is nothing on record to suggest that appointment of Local Commissioner would result in creation of any evidence in favour of plaintiff (petitioner herein).
8. As an upshot of discussion above, the revision petition is allowed and impugned order dated 23.09.2021 (Annexure P-1) is set aside. Ld. Trial Court to appoint the Local Commissioner and proceed further in accordance with law.
9. In the parting, it transpires that objection of *res judicata* by way of particular application taken by respondents before Ld. Trial Court was dismissed vide order dated 12.01.2018 {in connected case CR No.3131 of 2022 (O&M)} and no further steps were taken by defendants to challenge the same. In the totality of circumstances, it is expected that Ld. Trial Court shall first render decision on the specific issue *qua resjudicata* already framed by it, after the parties would adduce their respective evidence, and then to proceed further in accordance with law.
10. Pending civil miscellaneous application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

May 10, 2023
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Whether speaking/reasoned:	Yes/No
Whether reportable :	Yes/No