

111

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR-4556-2022 (O&M)

Date of Decision: 23.01.2023

Sunila Sodhi and anotherPetitioners

Versus

Shaminder Singh Bedi and othersRespondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Shubham Mittal, Advocate
for Mr. Lupil Gupta, Advocate
for the petitioners.

ARUN MONGA, J. (ORAL)

Petition herein, *inter alia*, is for setting aside order dated 11.5.2022 (Annexure P-6), passed by learned Additional Civil Judge (Senior Divn.), Guruharsahai, District Ferozepur, whereby application filed by petitioner/plaintiffs, under Order 26 Rule 9 CPC, for appointment of Local Commissioner, was dismissed.

2. Civil Suit in question is for possession of land and for assessment of mesne profits claiming that the respondent/defendants have

constructed their houses in the land of the petitioners/plaintiffs. It is asserted that this fact can be determined only after demarcation of land in question for which appointment of local commissioner is necessary to be appointed. In the premise, an application for appointment of Local Commissioner to demarcate the area in question was filed by the petitioners. However, vide impugned order, that has been rejected. Hence, the instant petition.

3. Heard.

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

“xxxx xxxx xxxx

7. *After hearing the contentions raised by the learned counsel for both the parties and going through the case file, I am of the view that the plaintiffs have filed the present suit for possession against the defendants. No doubt that Order 26 Rule 9 of Code of Civil Procedure empowers a court to depute a local commissioner for local investigation in a case if the court deems it requisite or proper for the purpose of elucidating any matter in dispute. In the present case, the plaintiffs have sought appointment of local commissioner on the ground to determine as to who is in possession of the suit property. It is settled law that the plaintiffs have to prove their own case and have to stand on their own legs. It is the plaintiffs who have to lead evidence and prove the averments made by them in their plaint. They cannot shift the onus to local commissioner which is upon the plaintiffs. Moreover the Court is not to collect the evidence on behalf of the plaintiffs and the plaintiffs have to prove their own case. The purpose of appointment of local commissioner is not to collect evidence on behalf of either party as the possession is to be proved by the parties by leading their cogent evidence.*

Thus in view of my above discussion, the present application stands dismissed.”

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

6. The petitioners' case is that their land measuring 3 kanals 3 marlas bearing rectangle No. 297 killa No. 1/1 (3-3) but the latter claim that they have encroached their house in their own land measuring 3 kanals 3 marlas bearing rectangle No. 297 killa No. 1/2 (3-11) situated at Guruharsahai Darmyani and not in the land of the plaintiff/petitioners. It is obvious that the two parcels of land –one being rectangle No. 297 killa No. 1/1 (3-3) owned by the plaintiff petitioners and the other being rectangle No. 297 killa No. 1/2 (3-11) owned by the defendant-respondents- are adjoining each other. Admittedly, there is a house constructed by the defendant-respondents. The question for determination is whether or not the petitioner-plaintiffs land or any part thereof has been encroached upon by the defendant-respondents.

7. While there is no quibble with the view taken by learned trial Court that the burden of proving their possession over the land is upon plaintiffs (petitioners herein) and they 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 the plaintiffs (petitioners herein) claim themselves to be the owners. The ownership of petitioners is not in dispute. In the premise, since a limited question is with regard to encroachment on the land of the petitioners for which the demarcation needs to be carried out, it would be rather appropriate and of assistance to learned 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.”

8. 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.

9. In the parting, 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 the plaintiffs (petitioners herein).

10. No prejudice thus would be caused to the opposite party in case the prayer of the 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, measure and demarcate

the land of rectangle No.297, Killa No.1/1(3-3) as also rectangle No.297, Killa No.1/2(3-11), prepare a site plan indicating whether land of rectangle No.297, Killa No.1/1(3-3) has been encroached upon and if so, depict the same in the site plan. The proceedings of measurement shall be videographed and the CD/Pen Drive of the same along with the report shall be submitted before the trial Court. Report be filed before the 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.

13. Petition is allowed accordingly.

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

(ARUN MONGA)
JUDGE

January 23, 2023
ashish

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