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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 11.10.2023

+ CM(M) 1659/2023 & CM APPLs. 52733/2023, 52734/2023

DR. MANYA PRASAD

..... Petitioner

Through: Mr. Tarkeshwar Nath and Mr. Lalit
Mohan, Advocates

versus

YATEENDER SINGH Jafa & ORS.

..... Respondent

Through: None

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 52734/2023 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

CM(M) 1659/2023 & CM APPL. 52733/2023

1. This petition filed under Article 227 of Constitution of India impugns the orders dated 30.05.2023 and 09.06.2023 passed by the ADJ-01, South District, Saket Courts, Delhi ('Trial Court') in CS DJ No. 154/2023, titled as '**Yateendra Singh Jafa v. Dr. Manya Prasad & Ors.**'.

1.1. The Trial Court vide order dated 30.05.2023 allowed the plaintiff's application filed under Order XXVI Rule 9 of Code of Civil Procedure, 1908 ('CPC') and appointed a Local Commissioner to visit the Flat No. 150, SFS Apartments, Hauz Khas, Aurobindo Marg, New Delhi – 110016 ('subject property') and file a report with respect to the repairs needed to



make the subject property habitable and comfortable for use. The local commission was duly executed.

1.2. Subsequently, the Trial Court vide order dated 09.06.2023, dismissed the application filed by the Petitioner herein (on 09.06.2023) under Section 151 of CPC seeking recall of the order dated 09.06.2023.

2. The Petitioner herein is defendant No.1 and Respondent No.1 is the plaintiff in the civil suit. The civil suit has been filed by Respondent No.1 for damages, permanent and mandatory injunction with respect to subject property. It is the case of the Respondent No.1 that the Petitioner herein is carrying out illegal construction in his flat, which has caused damage to the flat of the Respondent No.1.

2.1. During the pendency of the suit, Respondent No.1 filed an application on 19.04.2023 under Order XXVI Rule 9 of CPC on the following averments:

“3. That plaintiff's family members with their children's staying abroad are coming in 1st week of May 2023 for vacation to stay at the suit property and bathroom and other essential area is in damaged condition which has been briefly mentioned in the suit.

4. That plaintiff want to repair the damaged area for aforesaid reason and request Hon'ble Court for appointment of LC to asserting actual loss mentioned by the plaintiff and safe guard his interest so in future there would not be any dispute about the damaged area during the pendency of case and it will also help in the smooth delivery justice.”

(Emphasis Supplied)

3. The Petitioner herein elected not to file any reply to the said application and the same was taken up for consideration by the Trial Court on 30.05.2023, wherein during the course of oral arguments, the application was opposed by the Petitioner; however, the Trial Court rejected the said objections and passed the order dated 30.05.2023 appointing the Local



Commissioner to make a report with the following directions:

“I, therefore, appoint Ms. Nidhi Banga, Mob. No.9999221769, 011-45874391, email www.nblawfirm.in, M- 132, 1st Floor, GK-II, Delhi-48 as the Local Commissioner to visit the property on date fixed with the consent of the plaintiff to make a report with respect to the requirement and the amount of repairs needed to make the property habitable for comfortable use. Photographs of the damaged property, if any, be also taken by the Local Commissioner. Fee of the Local Commissioner is fixed at Rs.15,000/-, which shall be paid by the plaintiff.”

(Emphasis Supplied)

4. It is a matter of record, as noted above, that the local commission was duly executed and the Local Commissioner has already filed her report on 09.06.2023; a copy whereof has been duly provided to the counsel for the Petitioner.
5. At this stage on 09.06.2023, the counsel for the Petitioner herein filed an application under Section 151 of CPC seeking recall of the order dated 30.05.2023 vide which the Trial Court had appointed the Local Commissioner.
6. As stated earlier, the local commission already stood executed and concluded on 09.06.2023 i.e., when the application under Section 151 of CPC was filed seeking recall of order dated 30.05.2023. In the opinion of this Court, since the local commission already stood executed, the relief sought in this application had become infructuous.
7. However, the Trial Court has rejected the application dated 09.06.2023, filed by the Petitioner and clarified that the limited purpose of appointing the Local Commissioner was to ascertain the extent of repairs required to be carried out by Respondent No.1 for making the subject property inhabitable.
- 7.1. The Trial Court further clarified that the report of the local



commissioner was not binding on the said Court and was only a piece of evidence on record. The operative portion of the order reads as under:

“The judgment referred to by counsel for defendant no.1 apart from mentioning the requirement of giving evidence by the plaintiff also mentions that the report of Local Commissioner is merely a piece of evidence and not binding on the trial court. It is further interpreted from the judgment that the plaintiff has to give evidence in support of his case only for the purpose of final adjudication and the present Local Commissioner has been appointed for the limited purpose of ascertaining the amount of repairs needed to make the property habitable and comfortable use.

Moreover, on the last date of hearing i.e. 30.05.2023, opportunity was granted to all the parties to file reply but only defendant no.4 filed his reply without any specific objection to the application under Order XXVI Rule 9 CPC. The court has also observed in order dated 30.05.2023 "no written reply has been filed by the other defendants. However, application has been opposed". Hence, all the parties had been given sufficient opportunities to argue the application and after hearing all the parties, the order was passed.”

(Emphasis Supplied)

8. Based on the report of the Local Commissioner, the Trial court has granted liberty to Respondent No.1 to carry out the repairs to the damaged portions of the subject property at her own expense. The permission granted to Respondent No.1 to carry out the repairs vide order dated 09.06.2023 is also in consonance with the relief which was sought by the Respondent No.1 in his application dated 19.04.2023, wherein it was stated that the repairs are required to be carried out to make the subject property inhabitable.

9. In the opinion of this Court, in the facts of this case, the issue of construction carried out by Petitioner and its effect, if any, on the flat of the Petitioner is directly arising for consideration and the Respondent No.1 could not have been reasonably expected to keep the subject property in a state of disrepair until the trial.

10. In these circumstances, the course adopted by Respondent No.1 in



offering to have the property inspected from a Local Commissioner appointed by the Trial Court was, in fact, fair request so as to avoid any prejudice to the defence of both the parties in the suit.

11. It would also be relevant to note that the order appointing the Local Commissioner was passed on 30.05.2023 and the local commission stood executed and concluded on 09.06.2023. Further, the order dismissing the recall application as well stood dismissed on 09.06.2023, however, this petition challenging the said orders has been listed for the first time today on 11.10.2023. The said fact further evidences that no real prejudice has been caused to the Petitioner herein on account of the appointment of the Local Commissioner.

12. Learned counsel for the Petitioner has referred to judgment dated 08.07.2019 passed by High Court of Madhya Pradesh in MP No. 2406/2019, titled as '**Smt. Teena Pandey & Anr. vs. Dr. Kirnesh Pandey, 2021 SCC OnLine Bom 33**', to state that leading of evidence by the parties is a pre-condition for invocation of Order XXVI Rule 9 of CPC. However, the High Court of Karnataka in its recent decision in **Shadaksharappa v. Kumar Vijayalaxmi and Ors., 2023 SCC OnLine Kar 53**, has held that Order XXVI Rule 9 of CPC can be invoked either before the commencement of trial or after. The relevant extract of the judgment passed in **Shadaksharappa** (supra) reads as under:

"15. The next question is, at what stage of the proceeding in a suit, the application can lie? As could be easily noticed from the provision, the provision is not 'stage' centric. Thus the provision can be invoked either before the commencement of the trial or after. If the application is filed before the commencement of the trial, the court having regard to the pleadings and records may allow such application before the commencement of the trial. For example, in a given case, if the report is necessary for consideration of an application seeking some interim



measure, before the commencement of the trial, the Commissioner can be appointed, if the case is made out for a such appointment. On the other hand, again, having due regard to the pleadings and records, if the court finds that there is every likelihood that after recording the evidence of the parties, the need to appoint the court Commissioner may not arise or that the court is of the view that it can take a call on the application, only after recording the evidence, then it may defer the order on the application till such time. Thus the decision as to when the report of the Commissioner is to be secured must be taken having due regard to the facts and circumstances.”

(Emphasis Supplied)

12.1. Further, as a matter of practice, the intellectual property division of this Court in a number of matters appoints the Local Commissioners at the initial stage of the suit itself to visit the premises of the defendant and in fact the said orders are passed ex-parte. **[Ref: Order dated 23.05.2023 in CS (COMM) No. 334/2023, titled as ‘Eureka Forbes Limited (Formerly Forbes Eviro Solutions Limited) v. Santosh Nath & Ors.’].**

13. The Petitioner has further relied on the judgment in **Naseeb Deen & Anr. v. Harnek Singh, 2019 SCC OnLine HP 1034**, to state that the provisions of Order XXVI Rule 9 of CPC cannot be permitted to be used by the Respondent No.1 to create evidence against the Petitioner. However, the Trial Court in its impugned order has already recorded that the Local Commissioner has been appointed for the limited purpose of ascertaining the nature and extent of repairs needed to make the subject property inhabitable and comfortable for use.

14. Accordingly, this Court finds no merit in this petition. The same is dismissed. Pending application stands disposed of.

MANMEET PRITAM SINGH ARORA, J

OCTOBER 11, 2023/msh/aa

[Click here to check corrigendum, if any](#)