

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

124

CR-6371-2023 (O&M)
Date of Decision: 01.04.2024

Bimla Devi
...Petitioner

Versus

Pawan Kumar and others
...Respondents

CORAM: HON'BLE MR. JUSTICE VIKAS SURI

Present:- Ms. Preeti Singh, Advocate,
for the petitioner.

VIKAS SURI, J.

1. This revision petition has been filed under Article 227 of the Constitution of India assailing order dated 02.09.2023 passed by the Civil Judge (Junior Division), Bhiwani, whereby application for appointment of Local Commissioner moved by the plaintiff-petitioner was dismissed.
2. Brief facts of the case are that a suit for mandatory injunction directing the defendants not to interfere in the house owned and possessed by the plaintiff-petitioner shown in the site plan annexed with the plaint in green colour at points ABCDEFGH; and for permanent injunction directing the defendants to remove illegal encroachment done by raising wall as shown in red colour at point JL in the site plan attached with the plaint; and for restraining the defendants from making any unauthorized encroachment in the street/way and from creating any hindrance in the access of plaintiff

through the said street/way, was instituted by the plaintiff-petitioner.

3. Upon notice, the suit filed by the plaintiff-petitioner was opposed by filing written statement on behalf of defendant-respondent Nos.1 to 3, denying the claim of the plaintiff and submitted that the plaintiff and her husband were illegally occupying the land more than her share without legal partition of land comprised in khewat No.914/10-63. The correctness of the site plan annexed with the plaint was also disputed. In the aforesaid suit, the plaintiff-petitioner moved an application seeking appointment of Local Commissioner, averring that for ingress and egress from the house of plaintiff, there is a passage of 20 feet from the very beginning and the same is shown in the site plan attached with the plaint. The sewerage pipeline that is servicing the house of the plaintiff is underneath the said 20 feet wide street/passage and the main hole of the sewerage has also been constructed at point KL depicted in the aforesaid site plan. It is further averred that the defendants want to encroach upon the said passage and are adamant to damage the sewerage pipeline as well as the water pipeline, which are servicing the house of the plaintiff. On the aforesaid averments, following prayer was made:-

“Therefore it is respectfully prayed that in the abovementioned suit direction be given to appoint Local Commissioner and be directed to give exact position of the street of 20 feet be inspected and giving report regarding the existing position of the land in dispute. And the abovesaid 20 feet passage be digged and actual position of the sewerage and water pipe line towards the house of plaintiff be verified.”

4. On notice, defendant Nos.1 to 3 filed reply to the said application and opposed the same. It was pleaded that as per the settled law, no Local Commissioner can be appointed for collection of evidence for the parties and the same is not anyway helpful to decide the controversy as the plaintiff has failed to discharge the onus upon him.

5. The trial Court dismissed the application of the plaintiff seeking appointment of Local Commissioner vide impugned order dated 02.09.2023. It was noticed by the trial Court that the case is at initial stage and even all the defendants have not appeared in the case as yet. The plaintiff is well within his right to examine any witness or to produce and prove documentary evidence in support of the relief sought for. It was held that the grant of relief as sought in the application would amount to allowing her to use the process of Court for collection of evidence. Challenging the said order dated 02.09.2023 passed by the trial Court, the instant revision petition has been filed.

6. Learned counsel for the petitioner has reiterated the averments made in the application and the arguments raised before the trial Court. It is vehemently argued that the appointment of the Local Commissioner would help the trial Court in appreciating the dispute between the parties and arriving at a just decision in that regard.

7. Heard learned counsel for the petitioner and with her able assistance have gone through the material available on record.

8. On the aforesaid premise, the limited question which needs to

be addressed is with regard to determination of actual position of the suit property and the existence of sewerage and water pipelines underneath the said passage towards the house of the plaintiff-petitioner. For ready reference, Order XXVI Rule 9 CPC is extracted hereunder:-

“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. A perusal of the above Rule would clearly shows that for the purpose of elucidating any matter in dispute, the Court may issue a commission, as it thinks fit to make such investigation and to report thereon to the Court. It is a settled preposition of law that under Order XXVI Rule 9 CPC, assistance of the Court should not be sought to collect evidence, the onus to prove which lies upon the respective parties by adducing evidence at appropriate stage.

10. On a query of this Court, it is not disputed that the case is at the initial stage. The map/site plan appended with the plaint is yet to be proved on record by cogent evidence. Learned counsel for the petitioner has not been able to point out any positive averment made in the plaint. It is

submitted that the actual position would become clear by the report of the Local Commissioner and would in fact help in effective adjudication of the issue. It is well settled law that the process of Court ought not to be used to collect evidence on behalf of either of parties.

11. In the light of the settled proposition of law and keeping in view the facts and circumstances of the present case, this Court is of the considered view that in the absence of any positive evidence having been brought on record, the report of the Local Commissioner cannot be substituted for the evidence to be adduced by the parties in support of their pleadings, especially in view of the fact that according to the plaintiff-petitioner, the issue in the present case is whether the passage is 20 feet wide and the same has been encroached upon or not, whereas as per the contesting defendant-respondents, the issue is that the plaintiff-petitioner along with her husband is in possession of more land than her share and there is no passage as claimed. As such, the submission on behalf of the plaintiff-petitioner that the report of the Local Commissioner will only help to resolve the issue and would not amount to gathering of evidence, is misplaced at this stage.

12. It would not be out of place to notice here that the position would have been different had the plaintiff-petitioner adduced some positive evidence to prove their pleaded case and appointment of Local Commissioner was sought for elucidating any matter in dispute thereafter.

13. Accordingly, for the reasons stated above, no infirmity or perversity has been found in the impugned order and the instant petition

being devoid of merit is dismissed in *limine*.

April 01, 2024
harish

(VIKAS SURI)
JUDGE

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