



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

% ***Judgment reserved on: 04.01.2024***
Judgment pronounced on: 14.02.2024

+ **CM(M) 252/2023**

DHARAM BIR

..... Petitioner

Through: **Mr. Santosh Tripathi and Mr. Arun Panwar, Advs.**

versus

CHARAN SINGH

..... Respondent

Through: **Mr. S.S. Panwar, Ms. Nividita Panwar, Mr. Ravi Panwar and Ms. Punam Singh, Advs. with respondent in person.**

CORAM:
HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. A short question is involved in the present petition with respect to appointment of a Local Commissioner under Order XXVI Rule 9 of the Civil Procedure Code, 1908 (hereinafter referred to as 'CPC'). The litigants are real brothers, who are litigating on an issue of a common wall dividing their respective portion of the dwelling property.
2. The respondent had filed an application under Order XXVI Rule 9 read with Section 151 of CPC seeking appointment of a Local Commissioner to measure the properties of the parties, which was allowed vide impugned order dated 03.02.2023 passed by the Learned Civil Judge-01, (South) Saket Court, New Delhi in CS SCJ 1036/22, titled "*Dharam*



Bir vs. Charan Singh". Aggrieved by the impugned order, petitioner has challenged it by filing the present petition under Article 227 of the Constitution of India.

The facts briefly narrated are hereinunder:-

3. The case of the petitioner is that Late Mr. Mam Chand was the sole owner of the two properties bearing no. 34 & 75 situated in village Shahpur Jat, New Delhi. On 26.05.1983, vide a Tehrir nama, he divided the said properties equally between his three sons i.e. Mr. Dharam Bir/petitioner herein, Mr. Charan Singh/respondent herein and Mr. Dharampal. As per the Tehrir Nama, the two properties were divided into three portions A, B and C among the respondent, petitioner and Mr. Dharampal respectively. After the partition in 1983, all three brothers have been in possession of their respective shares.

4. The back portion of house no. 34, marked as A and B from point of V to V1 and V1 to W is divided by 4 inch wide wall. From point W to X, the wall is 9 inch wide, from point X to Y, the wall is 14 inch wide, from point Y to Z, the wall is 9 inch wide, these walls from point W to Z are the common walls which divide the portions A and B of the parties. In the present case, the main dispute is regarding the common wall i.e. the 4 inch wall on the ground floor from point V to W (as shown in site plan).

5. It is the case of the petitioner that the said wall was constructed by him and is part of his portion B of the property, whereas, it is the case of the respondent that it was constructed by him and is part of his portion A of the property.

6. In 2017, the respondent thought of reconstructing his portion and asked the petitioner in case he also wants to reconstruct his portion so that



they both can construct their houses together in their respective portions. Both the parties agreed and mutually decided to engage a contractor but after a few days, the respondent backed out without giving any reason. By this time, the petitioner had already started construction of his house and had invested huge amount of money.

7. On the other hand, the respondent filed a suit bearing no. CS no. 1109/2017, titled as “*Charan Singh vs. Dharambir & Ors.*” praying for permanent and mandatory injunction against the petitioner. Vide order dated 31.10.2017, ex-parte interim stay was granted and the petitioner was restrained from breaking or damaging any portion of the common dividing walls i.e. the 4 inch, the 9 inch and 14 inch wide walls as shown in the site plan. Subsequently, the respondent withdrew the suit, which was permitted by learned Civil Judge on 27.03.2019, subject to the cost of Rs. 2,000/- to be paid to defendant/petitioner herein.

8. Thereafter, petitioner wanted to reconstruct his front portion of the first floor and he asked the respondent to reconstruct his share or allow the petitioner to reconstruct his share at his own expense so that the front portion does not fall.

9. The respondent refused to do the same and instead filed another suit bearing no. CS SCJ no. 854/2022, titled as “*Charan Singh vs. Dharambir & Ors.*” praying for permanent injunction against the petitioner. The Ld. Civil Judge vide interim order dated 18.08.2022 restrained the petitioner from demolishing any part of the common passage at ground floor and first floor of the property, however, the respondent started demolishing his portion the very next day. The petitioner requested him not to break or damage the 9 inch and 14 inch common wall along with the 4 inch wall



constructed by the petitioner in his portion with his own money. After ignoring petitioner's request, the respondent went ahead with the demolition work which resulted in damage being caused to the 4 inch wall. Further, on 28.09.2022 and 29.09.2022, the labourers on respondent's instructions carelessly dug up a very deep pit (khadda) near the 9 inch common wall.

10. In order to restrain him from causing any more damage, the petitioner filed the present suit before the learned Trial Court praying for a relief of permanent and mandatory injunction against the respondent.

11. Conversely, it is the case of the respondent that the construction being raised by him is according to the site plan approved by the Municipal Corporation of Delhi (hereinafter referred to as "MCD"). Therefore, the construction is absolutely legal and no damage or harm is being caused to the common wall separating the two portions. Further, the common walls are intact and the columns and beams raised by the respondent are in his portion of the property.

12. The learned Trial Court vide orders dated 30.09.2022 and 22.10.2022, restrained the respondent from causing any further damage to the 4 inch wall of the petitioner and the 9 inch and 14 inch common wall and further restrained the respondent from breaking, demolishing, cutting, damaging or putting linear upon the walls between point V to V1, V1 to W (4 inch wall), W to X (9 inch common wall), X to Y (14 inch common wall) and Y to Z (9 inch common wall).

13. On an application moved by the respondent under Order XXVI Rule 9 CPC, the learned Trial Court vide the impugned order dated 03.02.2023 appointed the Local Commissioner to measure the portions of parties to



elucidate the matter in controversy. The said order forms subject matter of challenge in the present petition.

Submissions of the parties:

14. Asserting their claim, learned counsel for the petitioner submitted that the impugned order has resulted in misuse of provision of Order XXVI Rule 9 CPC, as the learned Trial Court without considering the relevancy of the appointment of a Local Commissioner in the present case has erroneously allowed the application even before the framing of issues. Further, the learned Trial Court failed to consider that this provision is not a tool to be used for creating evidence in favour of one party against the other.

15. It is submitted that the present case is an injunction suit where there is no dispute regarding the identification of the suit property nor there is any encroachment of the land. Therefore, the appointment of a Commissioner will amount to collection of evidence. Reliance is placed on a judgment of the High Court of Andhra Pradesh in the case of ***Kandukuri Rajababu versus The Rajahmundry Municipal Corporation, Civil Revision Petition No. 1705 of 2022.***

16. Learned counsel submitted that appointment of a Local Commissioner cannot be allowed to find out as to who amongst the parties is in possession of the disputed property as it is the Court's function to decide the same. Further, the said judicial function cannot be delegated to a Commissioner. Reliance is placed in the case of ***Mohammed Jaffer Abdul Qadeer Qureshi vs. Aziz-ur-Rehman Qureshi and others, 2016 (3) ALT 477).***



17. Learned counsel also submitted that the learned Trial Court remained oblivious of the fact that the property in question was of their deceased father and has been partitioned more than 40 years ago and in pursuant thereto, the parties are residing in their respective portion falling under their share. However, appointment of a Local Commissioner to measure the suit property will amount to reopening of the family partition, therefore, there is no necessity to appoint the commissioner. Moreso, the site plan is on record, which has been accepted by both the parties.

18. To substantiate the submissions, following judgments have been relied on behalf of the petitioner:

- a) ***Supertech Limited vs. Emerald Court Owner Resident Welfare Association and others*** (2021 SCC Online SC 648).
- b) ***Maruti Manohar Rathod vs. Snajay Ramesh Rathod*** (2019 SCC Online Bom 6446).
- c) ***Sarala Jain and others vs. Sangu Gangadhar and others*** (2016 (3) ALT 132).
- d) ***Naseeb Deen and Another vs. Harnek Singh*** [AIR 2019 HP 173].

19. The learned counsel for respondent rebutted the submissions and contended that in the present case, ownership and possession of the property is not in dispute, the exact location of the walls is in dispute. The parties have been involved in litigation since 1995 but the Petitioner has never made any claim over the disputed walls in the previous cases.

20. It is submitted that the petitioner had rebuilt his part of the property except the front portion above the common passage in 2017. After constructing a six storied building without an approved plan, the petitioner



now intends to illegally construct the front portion after demolishing the roof of the common passage and the partition wall on the first floor which he claims are in his portion.

21. It is submitted that the respondent has demolished his portion of the property to rebuild it according to a plan which is approved by the MCD. Further, to rebuild the property as per the sanctioned site plan, demolition of the disputed 4½ inch wall from point V to W, in his portion of the property is necessary to construct columns.

22. Further, it is submitted that due to the ongoing litigation, the construction of respondent's property is stalled which has resulted in huge financial loss and consequently, the respondent, who is 72 year old retired teacher has been forced to stay in a rented accommodation since October, 2022.

23. Learned counsel submitted that in the present case, the purpose of appointment of a Local Commissioner is not to collect evidence in favour of the parties but to identify the location of the disputed walls so as to effectively adjudicate the real controversy involved between the parties. Moreso, it is the discretion of the Court to decide as to in what circumstances, the Commissioner can be appointed in a civil suit.

24. It is submitted that the present suit is a perfect case for appointment of a Local Commissioner for various reasons as neither the title and possession of the property nor the area and measurements of the respondent's property is disputed and the existence of the common walls at the ground floor and first floor is admitted by the parties. The only dispute is regarding the exact location of the said walls for which the report of the



Local Commissioner is needed, therefore, there is no illegality or perversity in the impugned order.

25. The respondent has relied on the below mentioned judgments to support his submissions:

- i. ***Phoolchand Asra vs. Nagar Palika Nigam Raipur, Chhattisgarh*** [2022 Lawsuit (Chh) 1016](Para 5 to 10)
- ii. ***Pradeep vs. DDA*** [2022/DHC/004397]
- iii. ***Guru Nath Manohar Pavaskar & Ors. vs. Nagesh Siddappa Navalgund*** [(2007) 13 SCC 565]
- iv. ***Gurdial Singh and Ors. vs. S. Avatar Singh and Ors.*** [AIR 2009 P&H 164]
- v. ***Smt. Prembai & Ors. vs. Ghanshyam & Ors.*** [AIR 2011 MP 1]
- vi. ***Pitambar Nath vs. Gourang Ch Pati*** [2013 (1) OrissaLR653]

26. The essence of the contentions therefore lies in controversy with respect to exact location of the common wall dividing the portions of the suit properties of the parties and whether the same is located in the portion of the petitioner or respondent. In these circumstances, respondent moved an application under Order XXVI Rule 9 CPC before the learned Trial Court.

27. Order XXVI Rule 9 CPC provides for Commissions to make local investigation. The object of local investigation is not to collect the evidence, which infact is the power and duty of the Court but the purpose is to ascertain the factual position at the site, therefore, Commissions are essential with a view to elucidate any point, which remains irresolute. Apart from the fact that the parties in the suit can file an application for



appointment of a Local Commissioner, the Court can suo moto, if in the facts and circumstances of the case, deems necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute can appoint a Local Commissioner. Thus, there is no hard and fast rule for appointment of Local Commissioner, however, it shall depend on the facts and circumstances of every case, that Order XXVI Rule 9 CPC is applicable or not. In fact, the Local Commissioner is an extension of the Court for a particular purpose.

28. Order XXVI Rule 9 CPC reads as under:-

*“Order 26 Rules 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.”*

29. It is important to highlight the observations of the learned Single Judge of this Court in CM(M) 520/2022 titled as ***Pardeep vs. Delhi Development Authority***, which are as under:

“It cannot be forgotten that, technicalities apart, the ultimate aim and object of litigation is expeditious trial and resolution of the issue in controversy. Provisions which are intended to aid and assist the Court by expediting the process of identification of the exact issue in controversy, and delineation of the peripheries of the controversy before the Court, are, therefore, required to be expansively interpreted. If, by appointing a Local Commissioner, as prayed, any contentious aspect of the controversy could be resolved, it would appropriate for the Court to do so, rather than adopt a stance that, by doing so, it would be assisting either side in collecting evidence in its



favour. It is time we realized that the CPC is a statute intended to aid and assist speedy resolution of disputes, and not to bog down the parties to needless paperwork.”

30. This Court finds that the view adopted by the learned Trial Court in appointment of the Local Commissioner to measure the portions of the parties is proper in the facts and circumstances of the case.

31. The learned Trial Court observed in the impugned order dated 03.02.2023 as under:-

“In the two cross suits filed by the parties, the matter of contention is the common wall dividing the portion of parties. A part of wall has been claimed by both parties to have been constructed in their own portion out of their own funds. It is the case of the plaintiff himself that the property no. 34 was equally divided between plaintiff, defendant and Dharam Pal by Late Sh. Mam Chand after partition vide Tehrirnama dated 26.05.1983. Plaintiff has himself stated in the plaint that 4" wall has been constructed by him in his own portion out of his own funds. Same has been opposed by the defendant who has stated that the said wall from point V to VI and VI to W is not a common wall but wall constructed by the defendant in his own portion out of his own funds. The appointment of Local Commissioner to measure the portions of parties shall only elucidate the matter in controversy. Further, if the application is allowed, no prejudice shall be caused to the plaintiff.”

32. The petitioner's grievance in the present case is baseless that the Local Commissioner will collect evidence for the respondent or by taking measurement of portions of the parties will lead to a fresh partition of the properties of the parties. In fact, through the assistance of a Local Commissioner, the measurement of portions so obtained may be helpful to elucidate the matter in controversy i.e. issue with respect to the common wall in question, which of course shall be decided by the learned Trial Court.



33. The other judgments relied upon by the learned counsel for the parties being in the factual context of respective cases are not applicable to the present petition.

34. Having regard to the above, this Court does not find any illegality in the impugned order and thus, calls for no interference. Consequently, the petition along with pending application, if any, is dismissed.

SHALINDER KAUR, J.

FEBRUARY 14, 2024/ss