
(2016) 04 RAJ CK 0014

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1191 of 2014.

Ranjeet and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 25-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 7

Citation : (2016) 2 DNJ 817

Hon'ble Judges : Arun Bhansali, J.

Bench : Single Bench

Advocate : Vijay Jain, Advocate, for the Appellant; N.S. Rajpurohit, Dy.G.C and Vishal Singhal, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Arun Bhansali, J. - An application has been filed by the petitioner seeking listing of the stay application for orders.

2. It is submitted by both the learned counsel for the parties that the writ petition itself may be heard and decided.

3. This writ petition has been filed by the petitioner aggrieved against the order dated 17.01.2014 passed by the Civil Judge (Senior Division) Hanumangarh, whereby the application filed by the petitioner under Order 39, Rule 7 CPC has been rejected.

4. The petitioner filed a suit for declaration and permanent injunction against defendants No. 1 to 4 i.e. the State and authorities of the Water Resources Department. The respondents No. 5 to 8 were thereafter impleaded as parties-defendants. The suit was filed, inter alia, questioning the legality and validity of orders dated 05.10.2011 and the 11.10.2011 passed by the authorities and for consequential permanent injunction against the respondents.

5. The suit was resisted by the defendants by filing written statement.

6. Along with the suit, the petitioner filed an application under Order 39, Rule 1 and 2 CPC, to which also, replies were filed.

7. During the pendency of the application seeking temporary injunction, an application under Order 39, Rule 7 CPC was filed by the petitioner, inter alia, seeking appointment of Site Commissioner for the measurements based on the dispute sought to be raised by the petitioner in the suit/application seeking temporary injunction.

8. The application, though no reply was filed, was resisted by the defendants.

9. The trial court after hearing the parties, came to the conclusion that the relief claimed in the application amounts to collecting evidence, which cannot be permitted and, consequently, dismissed the application.

10. It is submitted by learned counsel for the petitioner that the trial court was not justified in dismissing the application by merely observing that application cannot be allowed for collecting evidence, inasmuch as, the circumstances of the case are such that determination of the application under Order 39, Rule 1 and 2 CPC cannot take place without there being an appropriate Commissioner Report pertaining to the dispute in question and, therefore, the order impugned deserves to be quashed and set aside.

11. Reliance was placed on *Rajeev v. State of Rajasthan and Ors.*, 2011(1) Civil Times (Raj.) 245 and *Haryana Waqf Board v. Shanti Sarup and Ors.*, (2008) 8 SCC 671.

12. Learned counsel appearing for respondents No.5 to 8 opposed the submissions made by the counsel for the petitioner. It was submitted that from the circumstances of the case, it is apparent that the petitioner was seeking to get appointment of Commissioner for the purpose of collecting evidence, which is not permissible in law and, therefore, the trial court was justified in rejecting the application.

13. Reliance was placed on *Shafiq Ahmed v. Naseer Ahmed and Ors.*, AIR 2014 Rajasthan 116 and *Prema Ram and Ors. v. Smt. Naramda Kunwar*, 2012(3) DNJ(Raj.) 1725.

14. I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

15. The dispute sought to be raised by the petitioner in the suit as noticed by the trial court in the impugned order, pertained to the grievance that the Gair Mumkin Khala is not located at the sanctioned place and the same has been constructed leaving nine feet distance from the sanctioned location within the petitioner's land and, therefore, sought permanent injunction in the suit and temporary injunction during the pendency of the suit.

16. The plea raised by the petitioner in this regard was denied by the defendants. As to the location of the Gair Mumkin Khala, the said aspect, can

only be determined after taking appropriate measurements by an independent/expert authority and it cannot be said that if the measurements are taken by independent authority appointed by the court, the same would amount to collecting evidence.

17. The principle that a Commissioner cannot be appointed for the purpose of collecting evidence, has to be applied to the circumstances of the case and in all cases, the application without applying the principle to the facts of the case, cannot be rejected. The trial Court committed the same mistake by simply noticing the principle and rejecting the application without indicating as to in the circumstances how the same would amount to collecting evidence.

18. So far as judgment in the case Shafiq Ahmed (supra) cited by learned counsel for the respondents is concerned, as noticed hereinbefore, the same pertains to the principle as noticed hereinbefore, however, the same has to be applied in the circumstances of the case and the principle cannot be applied universally dehors the facts involved in a particular case and the in case of Prema Ram (supra), the same pertained to the fact of possession, which has no application to the facts of the present case.

19. In view of the above discussion, the writ petition filed by the petitioner is allowed. the order impugned dated 17.01.2014 passed by the trial court is set aside. The trial court is directed to appoint independent/expert Commissioner to do the needful in terms of the prayer made by the petitioner on the next date fixed before it and proceed with the matter as expeditiously as possible.