

(2017) 06 P&H CK 0050
In the Punjab And Haryana At Chandigarh
Case No : 7535 of 2016 (O & M)

Skynet Enclave Residents Welfare Association & another	APPELLANT
Vs	
Amritpal Singh & others	RESPONDENT

Date of Decision : 02-06-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, Section 151,

Citation : (2017) 06 P&H CK 0050

Hon'ble Judges : Jaspal Singh

Bench : SINGLE BENCH

Advocate : Kshitij Sharma, Vikas Bahl, Sandeep Jain, Akshay Rawal, Vikram Preet Arora

Judgement

1. By virtue of the instant petition preferred under Article 227 of the Constitution of India, the petitioners have sought setting aside of order dated November 02, 2016 passed by the Civil Judge (Junior Division), Dera Bassi, District SAS Nagar, whereby during the hearing of an application under Order XXXIX Rules 1 & 2 CPC read with Section 151 CPC, the trial court has appointed a Local Commissioner.

2. It would be appropriate to reproduce the operative part of impugned order dated November 02, 2016 which reads as under:-

"From the above submissions made by the applicant/plaintiff and the defendants/respondents, it can be seen that the entire dispute is regarding the existence or the non-existence of the passage which the plaintiffs allege was left by the Skynet Enclave for their ingress and outgress. In order to effectively decide the

instant application for grant of Temporary Injunction, it is absolutely necessary to find out the actual plan of the land of the plaintiff and the location of the gate of the society for ingress and outgress of the plaintiff. I therefore, appoint the concerned Kanungo of village Lohgarh as LC to visit the spot and report regarding the actual position at the spot in relation to the location of the land of the plaintiffs and the available passage through the property of the society. The concerned Kanungo will report whether the site plan relied upon by the plaintiff is correct as per the actual position at the site or not. He will also report regarding the encroachment if any as alleged by the defendants. The copy of the site plan filed by the plaintiff shall be handed over to the LC by the Ld. Counsel for the plaintiff. Any order regarding the grant of Temporary Injunction will be passed once the report of the LC is received. It is also made clear that the fee of the LC is assessed of Rs.2000/- which is born equally by the plaintiff and the defendant side. Now for awaiting report of the LC, to come up on 15.11.2016."

3. Aggrieved against the aforesaid order, petitioners have approached this Court by way of instant revision petition.

4. While assailing the impugned order, it has been argued by learned counsel for the petitioner that the same is absolutely against the provisions contained under Order XXVI Rule 9 CPC. Though, the Local Commissioner has been appointed by the learned trial court suo moto but at the time of appointment of the Local Commissioner and calling the report from him, the trial court has not applied its judicious mind. Infact, it is well settled proposition of law that the object of order XXVI Rule 9 CPC is not to assist a party to collect evidence where it can get the evidence itself. In the case in hand, dispute is regarding existence or non-existence of the passage which, as per the respondents - plaintiffs was left by the petitioners for their ingress and outgress. The existence or non-existence of the passage can be established by the party claiming its existence by adducing evidence and such a power cannot be delegated to the Local Commissioner. It is also equally settled that where there is a dispute with regard to possession over a parcel of property, the Local Commissioner cannot be appointed to ascertain as to which party is in possession of the disputed premises as it has to be proved on the basis of evidence to be led the parties. For such purpose, assistance of the Local Commissioner is neither necessary nor justified.

Similar are the facts in the case in hand. Thus, the appointment of Local Commissioner as ordered by learned trial court vide the impugned order, that too, prior to disposal of application under Order XXXIX Rules 1 & 2 CPC read with Section 151 CPC is neither legal nor factually justified and the impugned order being unsustainable in the eyes of law is liable to be set aside.

5. To buttress the aforesaid contentions, learned counsel for the petitioners has relied upon various judgments captioned as Ramkirpal Missir & others Vs. Mahesh Pandey & others, 1952 AIR (Patna) 137; Basanta Kumar Swain vs. Baidya Kumar Parida & others, 1989 AIR (Orissa) 118; S. Anthonidoss and another vs. Sabesthiyan and another, 1996 (1) CTC 472; Sri Puttappa vs. Sri Ramappa, 1996 AIR (Karnataka) 257; Union of India vs. M/s. Kripal Industries, 1998 AIR (Raj) 224; Jagmohan vs. Ramesh Kumar @ Ramesh Chander and another, 2014 (1) Suraj Bal Singh and others vs. Jashbir and others, 2014 (1) Law Herald 136; Harwinder Kumar vs. Nasib Singh and others, 2015(2) Law Herald 1727; Shamsher Singh vs. Aman Aneja and others, passed in CR No.6039 of 2015, decided on 27th February, 2016; Hans Nagar vs. Gian Singh Nagar and others passed in CR No.5252 of 2016, decided on 19th August, 2016; Chaman Lal vs. Sumesh Pal passed in CR No.457 of 2017, decided on 8th February, 2017; Vir Singh vs. Mohinder Singh and others passed in CR No.2537 of 2017, decided on 7th April, 2017; The Principal, St. Patrick School and College vs. Mrs. Amaravathi (deceased) through LRs passed in C.R.P (NPD) No.2503 of 2009 and M.P. No.1 of 2009.

6. On the other hand, learned counsel for the respondents - plaintiffs, while supporting the impugned order, has argued that there is no illegality, impropriety or perversity in the order passed by the trial court. Moreover, the order has been passed by the trial court suo moto, that too, without any application moved by either of the parties to the suit. During arguments on an application under Order XXXIX Rules 1 & 2 CPC read

with Section 151 CPC, the trial court was of the view that in order to effectively decide the same, it is absolutely necessary to find out the actual location of the gate as well as the plan of the disputed property besides the existence or non-existence of the alleged passage. The Court has got vast powers to appoint the Local Commissioner suo moto without any application moved by either of the parties if it is of the view that local investigation is requisite and proper. In the case in hand, learned trial court was of the view that appointment of Local Commissioner would be helpful for proper appreciation of the facts as well as disposal of the injunction application. Since the discretion has been exercised by the trial court judiciously while appointing the Local Commissioner, no interference by this Court is justified. Respondents - plaintiffs accordingly prayed for dismissal of the petition.

7. After bestowing due consideration to the rival submissions made by learned counsel for the parties and appraisal of documents as well as scrutinization of impugned order, this Court is of the considered view that impugned order does not suffer from any infirmity, illegality and perversity and the same is absolutely in consonance with the legal proposition applicable to the facts & circumstances of the case in hand.

8. In the case in hand, Local Commissioner has been appointed by the trial court suo moto and not on the basis of any application moved by either of the parties as it was of the view that local investigation would be certainly helpful to it for arriving at a just conclusion with regard to the controversy involved in the matter as well as for proper appreciation of the facts & circumstances of the case and disposal of the application under Order XXXIX Rules 1 & 2 CPC read with Section 151 CPC. No doubt, Local Commissioner cannot be appointed to assist a party to collect evidence in its favour but in the case in hand, there is nothing to suggest that local investigation has been ordered by the trial court to collect evidence in favour of a particular party. If the factual position at the spot is favourable to the

petitioner, then why the petitioners are hesitating and resisting the appointment of Local Commissioner. There is no dispute with regard to observations made in the above referred authorities, but each case has its peculiar facts and has to be decided independently keeping in view the facts & circumstances thereof. The judgments cannot be made applicable as a straight jacket formula and for the simple reason, the same are distinguishable and have no direct applicability in the case in hand.

9. As is evident from the impugned order itself, there is a dispute with regard to existence of the passage which is alleged to have been left by the petitioners for the ingress and egress of the plaintiffs. Similarly, there is also a controversy with regard to location of the gate of the Society as an approach to the houses of the plaintiffs. Appointment of Local Commissioner and report submitted by him would be certainly helpful to the trial court for effective and judicious adjudication of the matter in controversy as well as disposal of injunction application. Moreover, the question whether the Commissioner's report is finally acceptable or not would be decided by the court concerned at the appropriate stage.

10. In case *Rajinder & Co. vs. Union of India & others*, 2003(1) RCR (Civil) 755, the Local Commissioner was appointed by the trial court with the direction to inspect the site to file a report as well as to measure the work done by the respondents. The High Court had set aside the order of appointment of Local Commissioner. However, the Hon'ble Supreme Court restored the order of trial court with the rider that the action will be without prejudice to the rights of the parties to substantiate their respective contentions regarding tenability or untenability of the Commissioner's report and its conclusions.

11. Adverting to the facts of the case in hand, Local Commissioner has been appointed by the trial court suo moto considering the necessity of appointment of Local Commissioner keeping in view the controversy involved in the suit. No error has been committed by the trial

court in appointment of Local Commissioner and in such circumstances, no interference in the impugned order is warranted. This Court is of the considered view that the trial court has exercised the discretion in a very judicious manner keeping in view the nature of controversy.

12. In the light of what has been discussed above, this Court does not find any merit in the instant revision petition and the same is accordingly dismissed whereby impugned order dated November 02, 2016 is upheld.

13. No order as to costs.