



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 409 of 2019

Reserved on : 05.10.2023

Decided on: 08.12.2023

Sh. Sanjeev Kumar alias Sanjeev RaizadaPetitioner

Versus

Sh. Yudhvir SinghRespondent

Coram

The Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting?1 Yes

For the petitioner : Mr. Ashok Sud, Senior Advocate with
Mr. Khem Raj, Advocate.

For the respondents : Mr. Sanjeev Kumar Suri, Advocate.

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged the order passed by the Court of learned Senior Civil Judge, Court No. 1, Una, District Una, in case No. 184/2017, titled as Sanjeev Kumara alias Sanjeev Raizada vs. Yudhvir Singh, in terms whereof, an application filed by the petitioner under Order 26, Rule 9 of the Code of Civil Procedure before the learned Trial Court for appointment of the Local Commissioner has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that the petitioner/plaintiff (hereinafter to be referred as 'the plaintiff') has filed a suit against the respondent herein (defendant in the suit) for permanent injunction to the effect that respondent does not

1 *Whether reporters of the local papers may be allowed to see the judgment?*

interfere or encroach upon or carry out any construction on the suit land by dispossessing the plaintiff forcibly. This suit was filed in the month of May, 2017.

3. During the pendency of the suit, an application was filed by the plaintiff under Order 26, Rule 9 of the Code of Civil Procedure, in January, 2019, praying for the appointment of a Local Commissioner, being a revenue expert, to visit the spot to demarcate the suit land and report whether the defendant has encroached upon the area referred to in the application or not.

4. This application has been dismissed by the learned Trial Court vide order dated 17.04.2019, by holding that the plaintiff had filed the suit for permanent prohibitory injunction and mandatory injunction, claiming the relief of possession upon the portion which was the part of Khasra No. 6720, on account of encroachment made by the defendant, which encroachment allegedly was made during the pendency of the suit. Learned Court held that the plaintiff had filed an application for amendment of the suit in which there was a specific averment made that portion ABCDEFHIA, which was part of Khasra No. 6720, was encroached upon by the defendant during the pendency of the suit. In this background, the plaintiff was now taking a destructive plea by moving the application for appointment of the Local Commissioner on the plea that it was necessary to find as to whether the land in issue was part of Khasra No. 6720 or not

because this implied that the plaintiff was not aware of his own boundaries and rather he was dragging the Court for collecting evidence on his behalf to prove that certain portion of suit land stood encroached upon by the defendant. Learned Court also observed that as the plaintiff had placed reliance upon the site plan, therefore, the onus was upon him to prove the same and the provisions of Order 26, Rule 9 of the Code of Civil Procedure could not be invoked so as to involve the Court in the process.

5. Having gone through the order passed by the learned Court below and having heard learned Senior Counsel for the petitioner/plaintiff as also learned Counsel for the respondent/defendant, this Court does not find any perversity in the impugned order. When it is a matter of record that the petitioner had sought amendment in the suit on the ground that during the pendency of the suit, certain part of the suit land stood encroached by the defendant, this pre-supposes that the petitioner was aware of his boundaries and only thereafter, he levelled allegations against the respondent of encroaching upon his land. In this background, but natural, the petitioner cannot be permitted to call upon the Court by way of appointment of a Local Commissioner to create evidence to prove his allegation as to whether part of the suit land mentioned in the application filed under Order 26, Rule 9 of the Code of Civil Procedure stood encroached upon by the defendant or not.

6. Reliance placed by learned Senior Counsel appearing for the petitioner on the judgments of this Court in Kangru Ram vs. Sriram 2018 (2) Shim. LC 1170 and Bali Ram vs. Mela Ram and another, 2002 (3) Shim. LC 131, is of no assistance to the plaintiff for the reason that the factual matrix involved in the said cases was completely different from the one involved herein.

7. This Court reiterates that as it is the specific allegation of the plaintiff that part of the suit land mentioned in the application was encroached by the defendant during the pendency of the suit, now to prove this fact, the petitioner/plaintiff has to stand on his own legs by adducing independent and reliable evidence and he cannot invoke the provisions of Order 26, Rule 9 of the Code of Civil Procedure and call upon the Court to generate evidence for him.

Accordingly, in view of above discussion, as this Court finds no merit in the present petition, the same is accordingly dismissed. Pending miscellaneous application(s), also stand disposed of accordingly.

(Ajay Mohan Goel)
Judge

December 08, 2023
(narender)