

Before Amol Rattan Singh, J.

RAJ KUMAR—Petitioner

versus

TARLOK SINGH AND OTHERS—Respondent

CR No. 6504 of 2018

January 18, 2019

Constitution of India—Article 227, Code of Civil Procedure Order 26 Rule 9. Application to apent local commissioner to determine encroachment—dismissed in execution proceedings. Held no other method to determine substantive right, but physical demarcation—local commission issued. Civil maintainable.

Held, In the light of the above, it needs to be said that a right to ownership or possession of any land is a substantive right of a party, and where such right has been adjudicated upon by a competent court of law, injuncting another party from entering upon such land or disturbing the possession of the opposite party over such land, the question of whether or not such injunction has been violated, is also a substantive right to be determined.

(Para 19)

And when there is no other method of determining such substantive right, but for physical demarcation of such land/property, court should, even in its discretion, issue a commission only for that purpose, especially when the substantive right of a party with regard to particular property already stands determined in a civil suit, with the execution of such right being thereafter dependent upon such demarcation.

(Para 20)

Dheeraj Mahajan, Advocate
for the petitioner.

A.S. Manaise, Advocate
for respondents no.1 to 7.

AMOL RATTAN SINGH, J.

(1) By this petition, the petitioner challenges the order of the learned execution court (Civil Judge (Junior Division), Gurdaspur), dated 28.08.2018, by which the petitioners' application, seeking appointment of a local commissioner has been dismissed.

(2) The application came to be filed in execution proceedings, upon a civil suit filed by the petitioner and his co-plaintiffs (proforma respondents no.8 to 13 herein) having been partly decreed in their favour, with the respondents-defendants restrained from alienating land measuring 5 marlas comprised in khasra no.61/3, khewat no.69, khatauni no.95 (as entered in the jamabandi for the year 2005-06), falling in the revenue estate of village Jeewan Chak, Tehsil and District Gurdaspur.

(3) The said land was also stated, in the decree, to be comprised in the plot shown as EFGHIJ as per the site plan annexed with the plaint.

(4) The allegation of the petitioner, in his application under Order 21 Rule 32 CPC, being that the respondents had deliberately violated the decree issued, he contended that demarcation was necessary to be conducted to determine the factual position qua encroachment upon the property, and therefore, for that purpose, an official from the revenue department was sought by him to be appointed as a local commissioner.

(5) Notice having been issued in the application by the execution court, and a reply having been filed by the respondent judgment debtors, that court, in its short order, stated as follows while dismissing the application:-

“A local commissioner is not to be appointed on mere asking. Some object is to be fulfilled by appointment of local commissioner. In the instant case, there is allegation that respondents have disobeyed the judgment and decree dated 09.07.2015 by alienating the property to respondent no.7. The matter in issue pertains to alienation. No purpose would be served by appointing local commissioner. Accordingly, application in hand is dismissed.”

(6) Before this court, Mr. Mahajan, learned counsel for the petitioner, submitted that the only method of determining whether an encroachment had actually been made by the respondents on the suit land, i.e. khasra no.61/3, was by an actual demarcation of the plot, because even before the learned trial court, in the suit in which the decree was passed, the stand of the respondents had been that they were not in possession of any part of khasra no.61/3, with them having raised construction only in khasra no.61/1, and with that court having therefore held as follows:-

“In this way, when there are specific admissions of plaintiff Raj Kumar and his witnesses, then their claim regarding identity of suit property stands automatically washed away, though admittedly defendants have no concern with land measuring 5 marlas comprised in khasra no.61/3. So any attempt on the part of defendants to alienate said land should be and must be checked as they have no right to alienate it. As such, in the light of this observation, Issue no.1 is accordingly decided in favour of plaintiff and against defendants.”

(7) Mr. Mahajan also relied upon various judgments of this court and the Supreme Court wherein directions to appoint a local commissioner had been given.

(8) *Per contra*, Mr. Manaise, learned counsel for respondents no.1 to 7, reiterated the stand of the said respondents (defendants), to the effect that they were only in occupation of khasra no.61/1 and not in 61/3 and consequently there was no need whatsoever for demarcation, because khasra no.61/3 was not in their occupation in any manner whatsoever.

(9) He cited a judgment of a co-ordinate Bench of this court in *Banarsi Dass* versus *Sunita Rani @ Sarita Rani and others*¹ in which, after referring to various judgments, it was held that a local commissioner cannot be appointed to “conclude evidence” for either party.

(10) He also raised an important issue on the maintainability of a revision under Article 227 of the Constitution, against an order of any court over which this court has supervision, by which order a local commissioner is either appointed or declined to be appointed.

(11) On that issue, he relied upon a Division Bench judgment in *Harvinder Kaur and another* versus *Godha Ram and another*².

(12) Having considered the matter, in my opinion, this petition deserves to be allowed, because with the respondents reiterating their stand before the execution court as they had taken before the trial court itself, to the effect that they were not in possession of the petitioners' land falling in khasra no.61/3, and the petitioner insisting that they had in fact encroached upon the said khasra number, the only method of

¹ 2017 (2) RCR (Civil) 274

² AIR 1979 P&H 76

determination of the factual contention raised by both sides, is by actual demarcation of the site.

(13) In fact, upon a question put to learned counsel for the respondents as to by what other method the true position could be determined, other than perhaps oral evidence led by both sides, he had no answer to that.

(14) Undoubtedly, a local commissioner cannot be appointed to gather substantive evidence for any party to a lis. However, Rule 9 of Order 26 of the Code of Civil Procedure, 1908, provides for issuance of a commission by which a person can be appointed for the purpose of making local investigations. The said rule reads as follows:-

“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.”

(15) Thus, with the aforesaid provision existing and there being no other method whatsoever for determining as to whether khasra no.61/1 has been encroached upon by the defendants or not, I do not find the impugned order sustainable.

(16) On the question of non-maintainability of a revision petition, undoubtedly in *Harvinder Kaurs'* case (supra), their Lordships held as follows:-

“8. In the light of the aforesaid observation, without dilating any more on this subject, the meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines or adjudicates some right or obligation of the parties in controversy. Thus, a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even after the satisfaction of the aforesaid test the power of revision would be exercisable by this court subject to the limitations put under

sub-section (1) and the proviso to Section 115 of the Civil Procedure Code.

9. Adverting to the facts of the present case, we find that the trial court has only rejected the application for the issuance of a commission on the ground that issue no.3 could be proved by producing the relevant record and that demarcation was not necessary. From these observations, it is clear that the learned Subordinate Judge did not decide any issue nor did he adjudicate for the purposes of the suit some right or obligation of the parties in controversy.”

(17) However, further ahead, in the penultimate paragraph of the judgment, it was observed as follows:-

“13. Before parting with the judgment, it may, however, be made clear that it cannot as a general rule be laid down that in no case a revision would lie against an interlocutory order passed under any other provision of Order 26, and that it would be on the facts of each case that it will have to be found out whether the interlocutory order against which a revision is sought to be filed, has adjudicated for the purposes of the suit some right or obligation of the parties in controversy or not.”

(18) Thus, it was made clear that non-maintainability of a revision petition against such an order could not be laid down as a general rule and where substantive rights or obligations of parties are decided by interlocutory order, a revision would be maintainable.

(19) In the light of the above, it needs to be said that a right to ownership or possession of any land is a substantive right of a party, and where such right has been adjudicated upon by a competent court of law, injunction another party from entering upon such land or disturbing the possession of the opposite party over such land, the question of whether or not such injunction has been violated, is also a substantive right to be determined and when there is no other method of determining such substantive right, but for physical demarcation of such land/property, a court should, even in its discretion, issue a commission only for that purpose, especially when the substantive right of a party with regard to particular property already stands determined in a civil suit, with the execution of such right being thereafter dependent upon such demarcation.

(20) Hence, as regards the contention of learned counsel for the respondents that this civil revision is not maintainable, that contention is rejected.

(21) Consequently, this petition is allowed, with the impugned order set aside and a direction issued to the execution court to appoint an experienced revenue officer as a local commissioner, to determine whether the respondent is in occupation of only khasra no.61/1 as contended by him, or is in occupation of any part of khasra no.61/3, in the revenue estate of village Jeewan Chak, Tehsil and District Gurdaspur.

(22) No order as to costs.

Shubhreet Kaur