



2024:JKLHC-JMU:599

Sr. No. 11

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case:- CM(M) No. 37/2024
CM No. 935/2024
Cav No. 253/2024

**Smt. Rachna Gupta, Age 47 years,
D/o Sh. Madan Lal Gupta,
W/o Sh. Rajesh Kumar Gupta,
R/o Plot No. 2, Sector-1, JDA Colony,
Upper Roop Nagar, Jammu.**

.....Petitioner

Through: Mr. M. L. Gupta, Advocate

Vs

- 1. Dr. Parmodh Baru,
S/o Sh. Om Parkash Baru,
R/o Shanti Kunj, 2nd Block, 3rd Floor, Sunjwan Road,
Near HP Petrol Pump Chowadhi, Jammu.**
- 2. Dr. Ajay Dogra,
S/o Sh. Om Parkash Baru,
R/o Shanti Kunj, 2nd Block, 3rd Floor, Sunjwan Road,
Near HP Petrol Pump Chowadhi, Jammu.**

..... Respondents

Through: Mr. M. K. Bhardwaj, Sr. Advocate with
Mr. Ajay Vaid, Advocate for the
Caveator/Respondent.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

**ORDER
04.03.2024**

(Oral)

01. Supervisory Jurisdiction of this Court enshrined under Article 227 of the Constitution, is being invoked by the petitioner herein for setting aside of order dated 13.02.2024 (for short "**the**



impugned order") passed by the Court of Principal District Judge, Jammu (for short "***the Trial Court***") in suit titled as "**Dr. Parmodh Baru and another Vs Smt. Rachna Gupta.**"

02. Facts emerging from the record would reveal that the plaintiffs/respondents herein instituted a suit under Section 6 of the Specific Relief Act, 1963 seeking possession of a plot of land measuring 1 kanal 3 marlas and 71 sq.ft comprising under Khasra No. 202 min, khewat No. 101 min and Khata No. 127 min along with a residential house constructed thereon situated at Rani Park Jammu (for short "***the suit property***").

The suit supra was maintained on the premise that the suit property fell into the share of one Prem Parkash, his two sisters and mother, which Prem Parkash shifted to Sweden in 1962 and that the father of the plaintiffs/ respondents herein took over the possession of the suit property after the departure of the said Prem Parkash from India and his settlement in Sweden and the property remained in exclusive physical possession of the father of the plaintiffs/respondents herein and upon his death under the plaintiffs/respondents herein without any interference having got matured into ownership on account of adverse possession as the electricity bills & water connection *qua* the suit property used to be paid by the plaintiffs/respondents herein besides having a landline



telephone connection installed therein despite the fact that the electricity and water connections have had been in the name of the father of the above named Prem Parkash, namely Sh. Sant Ram and that the suit property was neither allowed by the plaintiffs/respondents herein to be taken over or possessed by the said Prem Parkash nor the said Prem Parkash made any effort to recover the possession of the suit property from the plaintiffs/respondents herein and that the said Prem Parkash having executed a sale-deed in favour of the defendant/petitioner herein and got it registered on 16.01.2024 before Sub-Registrar, Jammu after obtaining relevant revenue extracts from the revenue authorities malafidely and despite the fact that the said Prem Parkash was never in possession of the suit property and that despite that the execution of said sale-deed the possession of the suit property was never handed over by the plaintiffs/respondents herein to the defendant/petitioner herein and that the defendant/petitioner herein never revealed to the plaintiffs/respondents herein to have filed a suit before the Court of Ist Additional Munsiff, Jammu for injunction in respect of the suit property against the plaintiffs/respondents herein having sought therein a decree for permanent prohibitory injunction and that on 04.02.2024 when the plaintiffs/respondents herein were away with their family at Kathua, the defendant/petitioner herein with her musclemans forcefully entered into the suit property by breaking



upon the locks and removed the belongings of the plaintiffs/respondents herein, inasmuch as, constructed a boundary wall blocking the entry of the plaintiffs/respondents herein to the suit property from their own property being abutting the suit property and also locked the common entrance gate of the suit property as well as to the property of the plaintiffs/respondents herein and that the plaintiffs/ respondents herein came to know about the said incident through one of their neighbours on mobile phone, whereupon the plaintiffs/respondents herein immediately reached on spot and stopped the construction going on besides informing the Police Post, Parade Ground, Jammu.

03. The plaintiffs/respondents herein alongside the aforesaid suit also filed an application for interim relief, which application, however, during the course of proceedings was not pressed and a statement thereto came to be made by then counsel before the Trial Court filed an independent application seeking inspection of the suit property by appointment of a Commissioner for obtaining firsthand account of the facts having happened on ground, stating therein the said application that they, the plaintiffs/respondents herein have had taken photographs and done videography of the suit property having placed on record with the plaint, which photographs and the videography requires to be verified and to be compared with the



factual position to be obtained by the Commissioner that may be appointed in the application.

04. The aforesaid application for appointment of Commissioner filed by the plaintiffs/respondents herein before the Trial Court came to be opposed by the defendant/petitioner herein *inter-alia* on the premise that the appointment of the Commissioner sought by the plaintiffs/ respondents herein is aimed at to create an evidence in their favour while denying the fact that the defendant/petitioner herein raised any construction over the suit property.

05. The Trial Court upon considering the aforesaid application in terms of the impugned order allowed the same while treating the application to have been filed under the provisions of Order 39 Rule (7) of the Code of Civil Procedure and consequently appointed Executive Engineer, R&B Division, Jammu as a Commissioner with a direction to inspect the suit property in presence of both the parties and to furnish a report in a sealed cover, providing further therein the impugned order that any report of inspection given shall not be used as a evidence and shall be subject to the objections of the defendant/petitioner herein.

Heard learned counsel for the petitioner and the counsel for the caveator and perused the record.

06. Caveat No. 253/2024 stands discharged.



07. Before proceeding to deal with the order impugned, a reference to the provisions of **Order 39 Rule (7)** and **Order 26 Rule (9)** of the Code of Civil Procedure becomes imperative being relevant and significant to the controversy herein.

The nature and scope of the provisions of **Order 39 Rule (7)** envisages that it enables the Court to order detention, preservation or inspection of any property which is the subject matter of a suit and for the said purpose the Court can authorize any person to enter upon any such property in order to record the existing condition of the property so that, later on, if there is any change, deterioration or mischief by any of the parties thereto that can be known to the Court and appropriate orders can be passed.

A plain reading of the provisions of Order 39 Rule (7) of CPC *prima-facie* tend to show that the power vested in a Court under the said provision is directory and discretionary in nature and not mandatory or obligatory as it *ex-facie* emerges from the expression used in Order 39 Rule (7) i.e. **“the Court may”** suggesting that the said provision is an enabling one and does not compel the Court to pass an order as sought by the party.

08. Order **26 Rule (9) of CPC** allows a Court to issue a commission for making local investigation for the purposes of elucidating any matter or dispute or ascertaining market value of



any property or amount of any mesne profit or damages or annual net profit.

A bare perusal of the said provision of Order 26 Rule (9) CPC tend to show that the object of the provision of making local investigation is not to collect evidence which can be adduced in the Court but to obtain material which from its very peculiar nature can best be had only on the spot, thus, suggesting that the provisions of Order 26 Rule (9) does not assist a party in getting the evidence which the party itself is supposed to collect, making it further clear from the expression “**elucidate**” appearing in the provision meaning to make lucid or clear, throw light on, explain or enlighten.

The provisions of Order 26 Rule (9) of CPC, as well, confers discretionary power on a Court to issue commission for local investigation as is evident from the expression “**the Court may issue a commission**” leaving no room of doubt that the provision too is enabling in nature to be exercised subject to the conditions and limitations laid down in the provision itself.

09. Having regard to the aforesaid provisions being Order 39 Rule (7) and Order 26 Rule (9) of CPC, there is a manifest distinction therein the said provisions under Order 39 Rule (7) has the object of keeping on record the existing condition of property so that if the same is subjected to any change later on, any deterioration or



mischief by any party, that can be known by the Court if and when desired or required, whereas the purpose of the provisions of Order 26 Rule (9) is to ascertain, collect or elucidate facts in respect of any matter in dispute after proper scrutiny and examination of the material without doing anything to collect evidence for a party as it is no business of a Court.

A reference here to the judgment of the Apex Court passed in case titled as **“Padam Sen and another Vs State of Uttar Pradesh”** reported in **AIR 1961 SC 218** would be relevant.

10. Keeping in mind the aforesaid provisions and the position of law laid down by the Apex Court in the judgment supra and coming back to the case in hand, it is an admitted fact that the application for interim relief accompanying the suit filed by the plaintiffs/respondents herein against the defendant/petitioner herein was not pressed by the plaintiffs/respondents herein. It is also not in dispute that the plaintiffs/respondents herein while praying for appointment of Commissioner in the application wherein the impugned order has been passed sought appointment of the Commissioner indisputably on the premise that the suit property has been taken over by the defendant/petitioner herein and a boundary wall came to be constructed by her which position on spot in this regard stands videographed and photographed by the



plaintiffs/ respondents herein, having been placed on record that a plaint, thus, seeking confirmation of the same by having a spot inspection conducted through intervention of the Court by appointment of a Commissioner.

It is pertinent to note here that the provisions of Order 39 Rule (7) of CPC are applicable for the disposal of an interlocutory application, whereas the provisions of Order 26 Rule (9) has its relevance on determination of the lis between the parties.

11. Under the aforesaid facts and circumstances, the Trial Court could not have invoked the provisions of Order 39 Rule (7) of CPC in the matter, in that, the application for interim relief had not been pressed by the plaintiffs/respondents herein, inasmuch as, the position obtaining on spot pertaining to the subject matter in dispute have had already been brought on record in the shape of photographs and videography by the plaintiffs/respondents herein along with the suit. The Trial Court, seemingly has grossly misdirected itself and in the process committed grave perversity while passing the impugned order by invoking the provisions of Order 39 Rule (7) of CPC having overlooked the import of Order 26 Rule (9) of CPC.

12. Viewed thus, what has been observed, considered and analyzed hereinabove, the impugned order is not legally sustainable.



Resultantly, the petition succeeds and the impugned order dated 13.02.2024 is set aside. Consequently, the report, if any, made by the Commissioner appointed by the Trial Court pursuant to the impugned order shall be deemed to be non-existent, inoperative and ineffective.

13. Disposed of along with connected application.

(JAVED IQBAL WANI)
JUDGE

JAMMU
04.03.2024
Muneesh

