
(2022) 05 SHI CK 0089

High Court Of Himachal Pradesh

Case No: Civil Miscellaneous Petition Main (Original) No. 188 Of 2022

Chanchal Kumar

APPELLANT

Vs

Prem Parkash And
Others

RESPONDENT

Date of Decision: May 30, 2022

Acts Referred:

Constitution Of India, 1950 " Article 227#Code Of Civil Procedure, 1908 " Order 26 Rule 9

Citation: (2022) 05 SHI CK 0089

Hon'ble Judges: Ajay Mohan Goel, J

Bench: Single Bench

Advocate: Naveen K. Bhardwaj

Final Decision: Dismissed

Judgement

Ajay Mohan Goel, J

1. By way of this petition filed under Article 227 of the Constitution of India, the petitioner has assailed order dated 20.04.2022, passed by the Court of

learned Senior Civil Judge, Kullu, District Kullu, H.P., in terms whereof, an application filed under Order 26 Rule 9 of the Code of Civil Procedure by

the petitioner/plaintiff for appointment of Assistant Collector, 1st Grade as a Local Commissioner for local investigation of the suit land and to report

about the factual position of motorable path existing on Khasra No. 482, situated in Up-Mohal Seobag, Phati and Kothi Kais, Tehsil and District Kullu,

H.P. has been dismissed.

2. Mr. Naveen K. Bhardwaj, learned counsel for the petitioner submits that the impugned order is not sustainable in the eyes of law for the reason that

the learned Court below has erred in not appreciating that as the petitioner/plaintiff is facing undue hardship on account of unauthorized acts of the

respondents/defendants, therefore, it was necessary that the application ought to have been allowed so that it could have been ascertained as to what

exactly were the dimensions and nature of Khasra No. 482, as the same would have had facilitated the adjudication of the suit.

3. Having heard Mr. Naveen K. Bhardwaj, learned counsel for the petitioner and having carefully gone through the averments made in the petition as

well as the documents appended therewith, this Court is of the considered view that the present petition deserves to be dismissed.

The application filed under Order 26 Rule 9 of the Code of Civil Procedure is on record as Annexure P-2. Relevant contents thereof as well as the

prayer made therein are quoted hereinbelow:-

“4. That respondents are threatening to raise or have partly succeeded in raising construction over Khasra No. 482 which is motorable path and

has also stacked woods, sand and aggregates over middle of the said motorable path/road thereby the respondents are not allowing applicant/plaintiff

to use the aforesaid motorable path.

5. That in order to bring the factual position of the spot before Commissioner/Tehsildar may be appointed with a direction to find out the exact position

of the motorable path over Khasra No. 482.

It is, therefore, prayed that the application may kindly be allowed and the local commissioner not below the rank of A.C. 1st Grade/Tehsildar may

kindly be appointed to visit the spot to find out the exact position of the motorable path passing through Khasra No. 482, situated in UP-Muhal Seobag,

Phati and Kothi Kais, Tehsil and Distt. Kullu, H.P. and submit the report before the Ld. Court, in the interest of justice.”

4. Learned Court below has rejected the application by assigning the reasons that the issues stood framed in the suit on 08.05.2018 and thereafter

more than three opportunities were granted to the plaintiff/petitioner to lead evidence, which was not done. Thereafter, the application was filed under

Order 26, Rule 9 of the Code of Civil Procedure with the intent of delaying the disposal of the suit. Learned Court also held that the issues raised by

the applicant/plaintiff were matter of evidence and the same were yet to be proved by the plaintiff by adducing necessary evidence in this regard.

Learned Court also held that the evidence sought to be collected by the plaintiff through Local Commissioner could be easily garnered by him

otherwise also. Learned Court also held that the onus was upon the plaintiff to sustain the pleadings made in the plaint by leading cogent evidence in

this regard and by avoiding to do so, the application filed under Order 26, Rule 9 of the Code of Civil Procedure was pre-mature because may be after

completion of evidence of parties, in case the plaintiff was able to make out a case for local investigation of the suit land, in that eventuality, the

plaintiff can approach by way of an application under Order 26, Rule 9 of the Code of Civil Procedure. In fact, learned Trial Court has given the

liberty to the petitioner/plaintiff to do so by observing that after completion of the evidence of the parties, the plaintiff may file an application under

Order 26, Rule 9 of the Code of Civil Procedure, if so advised and if he is able to make out a case in this regard, then the order passed by the Court

shall not come in his way.

5. The reasons which have been given by the learned Court below while rejecting the application filed by the petitioner/plaintiff are cogent and the

same call for no interference. It is a settled principle of law that he who alleges, has to prove. As it is the case of the plaintiff that

defendants/respondents are interfering in his possession vis-a-vis Khasra No. 482 of the suit land, therefore, onus is upon the plaintiff to lead cogent

evidence in this regard and prove his case, because under the provisions of Order 26, Rule 9 of the Code of Civil Procedure, the Court is not to act as

an agent of either of the parties in assisting the parties to create evidence in their favour. In fact, this is neither the intent nor the spirit of the provisions

of Order 26, Rule 9 of the Code of Civil Procedure. Onus squarely is upon the plaintiff to prove his case and this onus cannot be done away with by it

by preferring an application under Order 26, Rule 9 of the Code of Civil Procedure, as has been done in the present case.

6. During the course of arguments, it could not be disputed that despite more than three opportunities having been granted by the Court to lead

evidence, no evidence was led and rather an application under Order 26, Rule 9 of the Code of Civil Procedure was filed. This conduct of the

plaintiff/petitioner demonstrates that the observation made by the learned Court below that filing of the application was delaying tactic was the correct

observation. Filing of the application appears to be abuse of the process of law, as no cogent explanation has come as to why evidence was not led by

the plaintiff on the dates fixed by the learned Court below.

7. In view of what has been observed hereinabove, as this Court finds no merit in the present petition, the same is dismissed in limine. It is observed

that in case more than three opportunities have already been granted by the learned Court below to the plaintiff to lead evidence, then as to whether or

not any further indulgence in this regard to be shown, should be cautiously gauged by the learned Trial Court and opportunity to lead evidence should

not be given as a matter of routine. Miscellaneous applications, if any, also stand disposed of.