

The High Court Of Madhya Pradesh

MP-691-2018

(RAJENDRA KUMAR Vs SHREYANSH KUMAR JAIN)

Gwalior, Dated : 06-12-2018

Shri Abhishek Singh Bhadoriya, learned counsel for the petitioners.

Shri B.Raj Pandey, learned counsel for the respondents No. 1, 3 and 4.

This Miscellaneous Petition has been filed by the petitioners/tenants being aggrieved by order dated 25.11.2017 passed by the Court of II Civil Judge, Class II, Ashok Nagar in case No. COS2-A/2017 (old case No. 3A/2015), whereby learned Civil Judge has dismissed an application under Order 26 Rule 9 of CPC.

It is the contention of the petitioners that petitioners had moved an application for spot inspection, inasmuch as there is ambiguity in the map of the suit property filed by the plaintiffs/landlord and the one which has been filed by the tenant/present petitioners and therefore, to clarify as to which of the map is true and correct picture of the existing situation of the property, spot inspection is necessary.

Learned counsel for the petitioners has placed reliance on the judgment of Hon'ble Supreme Court in case of **Dalhousie Properties Ltd. Vs. Sooraj Mull Nagar Mull** as reported in **AIR 1997 SC 223**, wherein in a case involving issue of fixing of *mesne profits* a commission was appointed by the Court. In fact, the issue of *mesne profit* is different, inasmuch as Court before fixing such rent is required to take evidence as to the existence of similar properties in the same locality and the rent, which is being paid for such similarly located properties or if there are other guidelines, which provide a fair estimate of the rent to be fixed but in the present case, petitioners and the plaintiffs are in dispute as to the actual physical proximity of the suit property and petitioners' case is that there is additional accommodation available with the plaintiffs, which plaintiffs are trying to suppress and therefore, spot inspection to ascertain the true and correct picture of the suit property is necessary.

It is settled principle of law as has been submitted by Shri B.Raj Pandey, learned counsel for the respondents No. 1, 3 and 4 that to collect evidence, Commission cannot be appointed and therefore, an application under Order 26 Rule 9 of CPC deserves to be dismissed. He has placed reliance on the judgment of Coordinate Bench of this Court in case of **Ashok Parwat Vs. Sudarshan & Others** as reported in **2016(4) MPLJ 210**, wherein it has been held that Commission can be appointed only in case of demarcation and encroachment. Issue of possession is to be decided only on the basis of evidence. It has been further held that purpose of Order 26, Rule 9 or Order 39, Rule 7 is not to collect evidence which can be taken during proceeding of suit in Court.

In view of such judgment of Coordinate Bench of this Court and also the fact that aim and object of Order 26 Rule 9 of CPC is not to facilitate the collection of evidence to either of the parties, this Court is of the opinion that the impugned order does not suffer from any infirmity calling for any interference in supervisory jurisdiction. Thus, petition fails and is dismissed.

(VIVEK AGARWAL)
JUDGE

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