

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

**Reserved on: 04.03.2025
Pronounced on: 13.03.2025**

**CM(M) No. 201/2023
CM No. 6500/2023**

Saraj Din, age 70 years
S/o Haji Mohd Ali R/o Firdosabad
Sunjwan, Tehsil and District Jammu.

.....Appellant(s)/Petitioner(s)

Through: Mr. Ankush Manhas, Advocate
vs

Liyaqat Ali, S/o Haji Mohd Ali
R/o Firdousabad Sunjwan, Tehsil and
District Jammu.

..... Respondent(s)

Through: Mr. Bari Abdullah, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. This petition has been filed under Article 227 of the Constitution of India for the purpose of assailing the order dated 19.10.2023 passed by the court of learned Municipal Magistrate, Jammu (for short 'the trial court'), whereby the learned trial court in exercise of power under Order 26 Rule 9 CPC, has appointed the Tehsildar, Bahu as Commissioner to go on spot and demarcate the respective land of both the parties after giving due notice to each side. The application filed by the petitioner for staying the suit under Section 10 CPC has been dismissed vide the same order.
2. The aforesaid order has been impugned by the petitioner on the ground that Commissioner cannot be appointed when a particular fact is to be proved by leading evidence and the learned trial court has miserably failed

to appreciate that the dispute between the same parties is already sub-judice in another suit pending before the trial court only.

3. The brief facts necessary for the disposal of the present petition are that an application for staying of the proceedings of the suit titled “Liyaqat Ali vs. Saraj Din” was filed by the petitioner on the ground that earlier he had filed a suit for permanent prohibitory injunction with regard to land comprising Survey No. 356 min situated at Village Sunjwan Tehsil and District Jammu which was pending before the same court and the respondent had also filed the written statement. Thereafter, the respondent filed the suit for permanent prohibitory injunction for restraining the petitioner and his attorneys etc. from causing any interference into his peaceful possession in the land comprising Survey No. 356 min measuring approximately 16 marlas situated at village Sunjwan having dimensions as under:-

“North:- 75 ft, South:- 68ft, West:- 65 ft and East:- 65 ft”

4. The respondent on the other hand filed an application under Order 26 Rule 9 CPC for appointment of Commissioner to conduct nishan dehi of the land of the parties comprising Survey No. 356 min situated at Village Sunjwan Tehsil and District, Jammu for the purpose of elucidation/clarification of the matter in dispute. The learned trial court vide order impugned, while invoking inherent powers, clubbed both the matters, and appointed Tehsildar, Bahu as Commissioner by invoking power under Order 26 Rule 9 CPC for appointment of Commissioner.
5. Learned counsel for the petitioner has restricted his challenge only to the extent of appointment of Commissioner under Order 26 Rule 9 CPC by

the learned trial court as he has submitted that once the learned trial court has come to the conclusion that both suits are required to be clubbed and can be decided by common evidence, so the Commissioner could not have been appointed for the purpose of collection of evidence.

6. Per contra, Mr. Bari Abdullah, learned counsel for the respondent has raised objection with regard to maintainability of the petition and has placed reliance upon the judgment passed by the Hon'ble Supreme Court of India in case titled '**Radhey Sham and anr. Vs. Chhabi Nath and ors**', **2015 Legal Eagle (SC) 135**, to submit that this petition is not maintainable. He has also relied upon the judgment passed by the Co-ordinate Bench of this Court in case titled as '**Darshan Singh vs. Indru Devi**' decided on 16.08.2022.
7. Heard learned counsel for the parties and perused the record.
8. So far as first objection raised by the respondent in respect of maintainability of the petition is concerned, in case titled, '**Radhey Sham and anr. Vs. Chabbi Nath and anr.**', the Hon'ble Supreme Court has held that the orders of both civil and criminal courts can be examined under Article 227 of the Constitution of India only in very exceptional cases when manifest miscarriage of justice has been occasioned. In case titled, '**Shalini Shyam Shetty and anr. Vs. Rajendra Shankar Patil**' reported in **(2010) 8 SCC 329**, Hon'ble the Supreme Court has held as under:-

“(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a

gross and manifest failure of justice or the basic principles of natural justice have been flouted”

9. Now, it is to be examined whether the petitioner has made out a case for exercise of power under Article 227 of the Constitution of India for the purpose of assailing the order, whereby Commissioner was appointed under Order 26 Rule 9 CPC. The civil court has power to appoint the Commissioner both under Order 39 Rule 7 CPC and Order 26 Rule 9 CPC. In terms of Order 39 Rule 7 CPC, the civil court can appoint the Commissioner for the purpose of inspection of any property which is the subject matter of such suit. So far as Order 26 Rule 9 CPC is concerned, the Commission can be issued to make local investigation only for the purpose of elucidating any matter in dispute or ascertaining the market value of the property or an account of mesne profits or damages or annual net profits. In order 39 Rule 7 CPC, expression “inspection” has been employed, where as in Order 26 Rule 9 CPC, expression “investigation” has been employed and this provision vests the power to issue Commission only for the purpose of elucidating any matter in dispute, meaning thereby, when the court on the basis of ocular and documentary evidence, is not in a position to come to a definite conclusion on a particular issue or fact, which can be clarified by issuing a commission for local investigation. The scope of expression ‘investigation’ is larger and wider than ‘inspection’.
10. In the present case, the learned trial court has itself come to conclusion that both the suits can be disposed of by leading common evidence and in the present case, evidence is yet to be led by the parties. Once there was no matter in dispute between the parties which required elucidation, the

learned trial court could not have resorted to Order 26 Rule 9 CPC for the purpose of appointment of Commissioner. In '**Manzoor Ahmed & Ors.V. Assad Ullah & Ors.**' 2007 (2) JKJ[HC] 287, it has been held as under:

14. Occasion to seek elucidation on or to determine the matters appearing in rule 9 of Order XXVI of the Code would arise, in a suit, after framing of issues, which stage had not yet reached in the suit pending before learned Munsiff, Banihal.

(emphasis applied)

11. In the judgment passed by the Co-ordinate Bench of this Court in '**Darshan Singh vs. Indru Devi**', it is not specifically mentioned as to whether Commissioner was appointed by the trial court under Order 39 Rule 7 CPC or Order 26 Rule 9 CPC, but it is clear that the Commissioner was appointed to visit spot and make inspection, which demonstrates that Commission was appointed under order 39 Rule 7 CPC.
12. In both the suits the parties are claiming their respective possession over the suit land and it could have been decided only by permitting the parties to lead evidence which the learned trial court too has observed while consolidating both the suits.
13. In view of the above, this Court is of the considered view that the learned trial court has committed jurisdictional error while appointing the Commissioner under Order 26 Rule 9 CPC, when the parties had not even led their evidence and there was no issue before court that require elucidation. Had the trial court been unable to decide the controversy on the basis of evidence, then the Commission under Order 26 Rule 9 CPC could have been issued for elucidating the matter in dispute.

14. In view of above, the present petition is allowed in part by setting aside the order dated 19.10.2023 passed by the court of learned Municipal Magistrate, Jammu to the extent of appointment of Commissioner in suit titled “Liyaqat Ali vs. Saraj Din”.
15. **Disposed of.**

(RAJNESH OSWAL)
JUDGE

Jammu
13.03.2025
Neha-II

Whether the order is speaking:Yes

Whether the order is reportable:No

