

**AFR**

**Reserved on 16.11.2023**

**Delivered on 14.12.2023**

**Court No. - 85**

**Case :- ORIGINAL SUIT No. - 1 of 2023**

**Plaintiff :- Bhagwan Shrikrishna Virajman At Katra Keshav Dev Khewat  
No. 255 And 7 Others**

**Defendant :- U.P. Sunni Central Waqf Board And 3 Others**

**Counsel for Plaintiff :- Devki Nandan Sharma, Prabhash Pandey, Pradeep  
Kumar Sharma.**

**Counsel for Defendant :- Nasiruzzaman, Gulrez Khan, Punit Kumar  
Gupta**

**Hon'ble Mayank Kumar Jain, J.**

1. Heard Sri Hari Shanker Jain, learned Senior Counsel through video conferencing, Sri Vishnu Shanker Jain assisted by Sri Shaurya Krishan, Advocate, Sri Prabhash Pandey, Pradeep Kumar Sharma, learned counsel for the plaintiffs. Ms. Reena N. Singh, learned counsel for the plaintiffs in Original Suit No.7/2023.
2. Heard Sri Punit Kumar Gupta, learned counsel for defendant no.1. Sri Nasiruzzaman and Sri Mahmood Pracha learned counsel for defendant no.2. Sri Hare Ram, Advocate for defendant no.3. Sri Kamalesh Narayan Panday and Sri Birendra Prasad Maurya, Advocates for defendant no. 4.
3. Heard learned counsel for the parties at length on the following issues:-
  - a) Whether an application for rejection of plaint should be decided prior to the application for appointment of commission .
  - b) Application for appointment of commission under Order XXVI Rule 9 & 10 of the Code of Civil Procedure 1908 (Application No.130C)
4. With reference to the facts of the case, it is stated by plaintiffs in their plaint that:-

- (a) Lord Shri Krishna is the incarnation of Lord Vishnu. He took birth in human form on the day of *Ashtami* in *Krishna Paksh* in the month of *Bhadrapad* about 5132 years ago in *Dwaparyug* in the prison of Mathura, the place known as 'Katra Keshav Dev', in Virishni Kingdom ruled by King Kans. Every inch of land of Katra Keshav Dev is sacred for the devotees of Lord Krishna. Lord Krishna is world wide worshipped by devotees and followers of Vedic Sanatan Dharma.
- (b) In the year 1618, Raja Veer Singh Bundela of Orchha built/renovated a temple at the birth place of Lord Shri Krishna at Katra Keshav Dev, Mathura.
- (c) During the year 1669-70, Aurangzeb, the Mughal Ruler, partially demolished the temple of Lord Krishna at Katra Keshav Dev and forcibly raised a construction which was named as 'Idgah Mosque'.
- (d) After winning the battle of Goverdhan, Marathas became the ruler of entire area of Agra and Mathura. They removed the structure of the Mosque and restored/renovated the birth place temple of Lord Shri Krishna at Katra Keshav Dev. They also declared the land of Agra and Mathura as *Nazool* land.
- (e) The East Indian Company under Lord lake conquered the area of Mathura and Agra by defeating Maratha ruler Scindia Army in the year 1803 and became the ruler of this area since then. The British Government continued to treat the land of Agra and Mathura as *Nazool* land.
- (f) The British Government put the land measuring 13.37 acres of Katra Keshav Dev for auction sale through public auction in the year 1815. Raja Patnimal of Benaras purchased this

land and became the owner and in possession over this property.

Number of cases were filed by Muslims questioning the auction sale, ownership and possession of Raja Patnimal but all were dismissed.

- (g) In the settlement map of 1860, the compound was described as Katra Keshav Dev.
- (h) In different court proceedings, six decrees were passed in favour of Raja Narsingh Das, the descendant of Raja Patnimal in respect of property of Katra Keshav Dev.
- (i) The spot was compared through a survey map in 1903, and it was numbered as 321. A temple of Ganga Ji was there.
- (j) In 1911, the property of Raja Patnimal came under court of ward and the compound of Katra Keshav Dev was administered by the Collector of Mathura.
- (k) In a Civil Suit No. 76 of 1920 which was filed by the Muslims, it held that the disputed land did not belong to the Mosque and Hindu defendant were building a temple upon the site of previously existing temple. This suit was dismissed. Against this judgement and order, First Appeal No. 236 of 1921 was also dismissed.
- (l) Thereafter in Civil Suit No. 517 of 1928 filed by Rai Kishan Das the heir of Raja Patnimal, a dispute was raised whether the plaintiff was the owner of the land and the material lying thereupon. The suit was decreed by the Trial Court and the judgment was affirmed by the First Appellate Court in favour of the plaintiff. The second appeal no. 691 of 1932 was dismissed. It was held that Raja Patnimal and his heirs were rightful owner of 13.37 acres of land of Katra Keshav Dev and Muslims had no right over any part of the said land.

- (m) On 08.02.1944, Rai Kishan Das and Rai Anand Das, legal heirs of Raja Patnimal, executed the sale deed of 13.37 acres land of Katra Keshav Dev in favour of Mahamana Pandit Madan Mohan Malviya, Goswami Ganesh Dutt and Bhikenlal Ji Aattrey for a consideration of Rs.13,400/-. This consideration which was paid by Sri Jugal Kishore Birla. Pursuant to execution of sale deed, the purchasers came into the possession of entire land of Katra Keshav Dev.
- (n) Suit No. 4 of 1946 was filed on behalf of Masjid Idgah against Mahamana Pandit Madan Mohan Malviya and others questioning the sale deed and claiming the right of pre-emption. The suit was dismissed on the basis of compromise holding that the judgement dated 02.12.1935 passed by the Hon'ble High Court in second appeal no. 691 of 1932 would be binding on the parties.
- (o) Shri Jugal Kishore Birla in order to construct a glorious temple at Katra Keshav Dev glorifying the birthplace of Lord Shri Krishna created a trust in the name of 'Shree Krishna Janambhoomi Trust' on 21.02.1951 through trust deed registered on 09.03.1951. The entire property of 13.37 acres of Katra Keshav Dev was vested in the trust. He dedicated the entire land to deity Lord Shri Krishna Virajman with the object to construct a grand temple.
- (p) The said trust failed to perform its duty to secure, preserve and protect the trust property. It became defunct from 1958.
- (q) On 01.05.1958, a society known as 'Shri Krishna Janam Sthan Seva Sangh' was formed and after 1977 the word 'Sangh' was substituted with the word 'Sansthan'.
- (r) The society was different entity from the trust. It had no power or jurisdiction to act on behalf of the trust. The trust

had no authority to transfer, delegate or entrust any work to the society to perform.

- (s) Civil Suit No. 361 of 1951 was filed by Muslims against Sri Krishna Janambhoomi Trust claiming cause of action on the basis of sale deed executed by alleged Trust Masjid Idgah in their favour. The suit was dismissed and it was held that the sale deed was executed without any authority and same was illegal.
- (t) Suit No. 43 of 1967 titled as Shri Krishna Janam Sthan Sewa Sangh Mathura also known as Shri Krishna Janambhoomi Trust was filed which was verified by Shri Bhagwan Das Bhargava as Joint Secretary of Shri Krishna Janam Sthan Sewa Sangh.

The said suit was not filed by 'Shri Krishna Janambhoomi Trust' but it was filed by the society namely 'Shri Krishna Janam Sthan Sewa Sangh Mathura'. The prayer was to remove the super structure raised by Masjid Idgah Trust and others.

- (u) On **12.10.1968** a compromise was entered between Shri Krishna Janam Sthan Seva Sangh Mathura and Trust alleged Shahi Masjid Idgah, Mathura. The compromise was presented on 17.10.1968 and was registered on 22.11.1968 by Sub-Registrar Mathura. The compromise was filed in the court of Civil Judge Mathura in Civil Suit No. 43 of 1967. This suit was decreed on the basis of compromise on **20.07.1973**.
- (v) Shri Krishna Janam Sthan Sewa Sangh had no propriety or ownership right in the property of Katra Keshav Dev which stood vested in the deity and the Trust. Shri Krishna Janam Sthan Sewa Sangh had no power or authority to file the Suit No. 43 of 1967. Thus, the compromise entered into between

Shri Krishna Janam Sthan Sewa Sangh and Trust alleged Shahi Masjid Idgah is illegal and void ab initio and the same is not binding on the deities and the devotees.

- (w) An application numbered as Misc. Case No. 234 of 1993 was filed under Section 92 of the CPC before learned District Judge, Mathura to institute suit *inter alia* praying to remove defendant no. 1 to 6 from trusteeship. The application for permission was rejected by the learned District Judge on 06.05.1994. First Appeal No. 199 of 1996 was also dismissed on 23.09.1997 by the Hon'ble Allahabad High Court holding that the entire property of Katra Keshav Dev vested in Trust and Shri Krishna Janam Sthan Sewa Sansthan could not represent the Trust.

5. The instant suit registered as Original Suit No. 353 of 2020 titled as Bhagwan Shri Krishna Virajman at Katra Keshav Dev and Others Vs. U.P. Sunni Central Waqf Board through Chairman and others, is now transferred to this Court and is registered as **Original Suit No. 01 of 2023**. The reliefs claimed by plaintiffs are that :-

- (a) decree the suit in favour of plaintiffs against the defendants cancelling the judgment and decree dated 20.07.1973 and judgement and decree dated 07.11.1974 passed in Civil Suit No. 43 of 1967 by Civil Judge, Mathura;
- (b) declare that the judgment and decree dated 20.07.1973, judgment and decree dated 07.11.1974 passed in Civil Suit No.43 of 1967 by Civil Judge, Mathura is not binding on the plaintiffs;
- (c) decree the suit for declaration declaring that land measuring 13.37 acres of Katra Keshav Dev, shown by letters A B C D in the site plan, vest in the deity Lord Shri Krishna Virajman;
- (d) decree the suit for mandatory injunction in favour of the plaintiffs and against the defendant no.1 and 2 directing them

to remove the construction raised by them encroaching upon the land shown by letters E B G F in the site plan within the area of Katra Keshav Dev, Mathura and to hand over vacant possession to Shri Krishna Janambhoomi Trust within the time provided by this Hon'ble Court;

- (e) decree the suit for prohibitory injunction restraining defendant no.1 and 2, their workers, supporters, men, attorneys and every person acting under them from entering into premises of 13.37 acres land of Katra Keshav Dev City District Mathura;

**Disposal of issue no. a)**

6. Defendant No. 1 and 2 have filed separate applications under Order VII Rule 11(D) read with Section 151 of the Civil Procedure Code (hereinafter referred to as 'Code'). The learned counsel for defendant no.1 and 2 have submitted that the suit of the plaintiffs is barred by law under provisions of various statutes which are set out as under:-

- (a) Section 3(A) of the Code;
- (b) Section 3, 4, 6 and 7 of Places of Worship (Special Provisions) Act, 1991;
- (c) Section 6, 85 & 108A of The Waqf Act, 1995;
- (d) Section 58 of the Limitation Act, 1963; and
- (e) Section 34 of the Specific Relief Act, 1963.

In view of the above, it is argued that the plaint deserves to be rejected.

7. Copies of the aforesaid applications were provided to learned counsel for the plaintiffs and as prayed by them they were accorded an opportunity to file their objections.

8. The learned counsel for the defendant No. 1 and 2 argued that once an application is filed under Order VII Rule 11 of the Code, it should be decided first. The object of this provision is to reduce the burden of the Courts which are already overburdened. Apart from this, another object of

this provision is to save the time of the Court. The provision of Order VII Rule 11 of the Code imposes a bar upon the Court to not proceed further without deciding upon the issues raised by the defendant by way of an application.

9. In order to support his arguments, learned counsel for the defendant no.1 and 2 placed heavy reliance upon the judgment of the Hon'ble Apex Court passed in ***R.K. Roja v. U.S. Rayudu, AIR 2016 SC 3282***. It is submitted that the observation made by the Hon'ble Apex Court are fully applicable in the present proceedings. The following paragraphs of the said judgment are referred:-

*“6. Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case the application is rejected, the defendant is entitled to file his written statement thereafter (see Saleem Bhai v. State of Maharashtra [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557] ). But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court. To quote the relevant portion from para 20 of Sopan Sukhdeo Sable case [Sopan Sukhdeo Sable v. Charity Commr., (2004) 3 SCC 137] : (SCC pp. 148-49)*

*“20. ... Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word “shall” is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant.”*

*9. The procedure adopted by the court is not warranted under law. Without disposing of an application under Order 7 Rule 11 CPC, the court cannot proceed with the trial. In that view of the matter, the impugned order is only to be set aside. Ordered accordingly.”*

10. Reliance is also placed on the judgment of ***Smt. Archana Kanaujia and Anr. Vs. Pooja Educational and Social Development Trust and Others, 2021 (9) ADJ 549***. The learned counsel for the defendant no. 1 and 2 submitted that the powers conferred under Order VII Rule 11 obviate the Courts from taking a full fledged trial when the plaint does not

disclose cause of action or is otherwise barred by any law. Following paragraphs are referred:-

*“10. The power conferred by Order VII Rule 11 is primarily to ensure that a suit which discloses no cause of action or is otherwise barred in law is brought to an end at the threshold. This obviates the courts from undertaking a full fledged trial and then ultimately coming to a conclusion either that the plaint discloses no cause of action or that the jurisdiction of the court stands ousted by law. The legislative policy underlying Order VII Rule 11 was pithily explained by the Supreme Court in Azhar Hussain Vs. Rajiv Gandhi reported in 1986 (Supp) SCC 315 in the following terms:-*

*"12. Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation the court readily exercises the power to reject a plaint if it does not disclose any cause of action. Or the power to direct the concerned party to strike out unnecessary, scandalous, frivolous or vexatious parts of the pleadings. Or such pleadings which are likely to cause embarrassment or delay the fair trial of the action or which is otherwise an abuse of the process of law. An order directing a party to strike out a part of the pleading would result in the termination of the case arising in the context of the said pleading. The courts in exercise of the powers under the Code of Civil Procedure can also treat any point going to the root of the matter such as one pertaining to jurisdiction or maintainability as a preliminary point and can dismiss a suit without proceeding to record evidence and hear elaborate arguments in the context of such evidence, if the court is satisfied that the action would terminate in view of the merits of the preliminary point of objection. The contention that even if the election petition is liable to be dismissed ultimately it should be so dismissed only after recording evidence is a thoroughly misconceived and untenable argument. The powers in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigation will not make demands on their time or resources, will not impede their future work, and they are free to undertake and fulfil other commitments. Such being the position in regard to matter pertaining to ordinary civil litigation, there is greater reason for taking the same view in regard to matters pertaining to elections. ....To wind up the dialogue, to contend that the powers to dismiss or reject an election*

*petition or pass appropriate orders should not be exercised except at the stage of final judgment after recording the evidence even if the facts of the case warrant exercise of such powers, at the threshold, is to contend that the legislature conferred these powers without point or purpose, and we must close our mental eye to the presence of the powers which should be treated as non-existent. The court cannot accede to such a proposition. The submission urged by the learned counsel for the petitioner in this behalf must therefore be firmly repelled."*

11. Learned counsel for the defendant no. 1 and 2 further referred the judgment of ***Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead Through Legal Representatives and Others, (2020) 7 SCC 366*** and has referred following paragraphs;-

*"23.15. The provision of order 7 rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clause (a) to (e) are made out. If the court finds that the plaint does not disclose a cause of action or that the suit is barred by any law the court has no option but to reject the plaint.*

*30. The present suit filed by the Plaintiffs is clearly an abuse of the process of the court, and bereft of any merit. The Trial Court has rightly exercised the power under Order VII Rule 11 CPC, by allowing the application filed by Respondent Nos. 2 & 3, which was affirmed by the High Court."*

12. Sri Punit Kumar Gupta, learned counsel appearing on behalf of the defendant no.1 argued that in the matter of **C/M Anjuman Intezamia Masajid Varanasi**, the Hon'ble Apex Court ordered transfer of civil suit from the Court of Civil Judge (Senior Division) to the Court of District Judge, Varanasi and the court concerned was directed to decide the application under Order VII Rule 11 on priority.

13. Per contra, Learned counsel for the plaintiffs Sri Hari Shanker Jain assisted by Sri Vishnu Shanker Jain vehemently opposed the argument advanced by learned counsel for defendant no.1 and 2 and submitted that an application under Order VII Rule 11 of the Code can be decided at any stage before the trial. The plaint cannot be rejected merely because an application for rejection of plaint is filed by the defendant without accounting for the objections of the plaintiff.

14. To buttress his argument on the issue that the suit of plaintiffs is barred by certain laws, the learned counsel had referred to the provision contained in the Order 14 of the Code. It is submitted that Rule 5 of the

said Order empowers the Court to frame issue on the basis of pleadings of the parties and to decide it. Whether the plaint is barred by certain laws, it can only be decided after framing a preliminary issue by the Court. The issue as to whether the suit is barred by law is a mixed question of fact and law. The plaintiffs are yet to file their objections against this application. Therefore, application for rejection of plaint cannot be decided without taking into consideration the objections of the plaintiffs and without giving an opportunity of being heard.

15. To bolster his submissions, the learned counsel for the plaintiffs stated that the proceedings of issue of commission and rejection of plaint are independent proceedings. The application for rejection of plaint is to be decided before proceeding with the trial. The trial has not yet commenced. Therefore, it is the sole discretion of the trial Judge to decide the application independently at any stage before proceeding with the trial. It is also submitted there is no straight jacket formula which has to be followed to decide the application for rejection of plaint before the disposal of the application for issue of commission. The Court has to take decision by itself and no body can compel the court to decide the application according to the wishes of particular party.

16. In support of his arguments, the learned counsel for the plaintiffs relied upon the following judgments:

(a) **Saleem Bhai Vs. State of Maharashtra (2003) 1 SCC 557**

(b) **Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead Through Legal Representatives and Others, (2020) 7 SCC 366**

(c) **Kum. Geetha, D/o Late Krishna & Ors. Vs. Nanjundaswamy (Civil Appeal No.7413 of 2023 arising out of S.L.P. (C) No.8147 of 2016**

(d) **C/M Anjuman Intezamia Masajid Varanasi Vs. Rakhi Singh and Others, 2022 SCC Online All 396**

17. Heavy reliance is placed upon the judgment of *Saleem Bhai (supra)* by the learned counsel for the plaintiffs and it is submitted that trial court can exercise the power under Order VII Rule 11 of the Code at any stage

of the suit even at any time before the conclusion of the trial. The following paragraph of the judgment is referred:-

*“9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit- before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.”*

18. Learned counsel for the plaintiffs further argued that in ***Dahiben Vs. Arvinbhai Kalyanji Bhanusali (Gajra) Dead Through Legal Representatives and Others (supra)*** the law laid down by the Hon’ble Supreme Court in ***Saleem Bhai case (supra)*** has been followed. The learned counsel has referred the following paragraph:-

*23.14. The power under Order VII Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai v. State of Maharashtra. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain (supra).*

19. Reliance is placed by learned counsel for the plaintiffs by referring the following paragraph of the case in ***Kum. Geetha, D/o Late Krishna & Ors. Vs. Nanjundaswamy (supra)*** that:-

*“23.14 The power under Order 7 Rule 11 CPC may be exercised by the court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai v. State of Maharashtra [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557] . The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain case [Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315. Followed in Manvendrasinhji Ranjitsinhji Jadeja v. Vijaykunverba, 1998 SCC OnLine Guj 281 : (1998) 2 GLH 823].”*

20. A straight forward argument is made by the learned counsel for the plaintiffs that the plaint is to be read meaningfully as a whole. Upon such

reading if the plaint discloses a cause of action then the application for rejection of the plaint must be dismissed.

21. Sri Vishnu Shanker Jain, learned counsel for the plaintiffs vehemently argued that in a similar matter relating to C/M Anjuman Intezamia Masajid Varanasi, this issue came up before this Court in **C/M Anjuman Intezamia Masajid Varanasi Vs. Rakhi Singh and Others (supra)**.

He referred the following paragraph to support his argument:-

*“23. The challenge to the order dated 05.04.2022 is also not well-founded, because it is well-known that an application under Order VII Rule 11 of the Code can be considered at any stage of the suit if the grounds disclosed by Order VII Rule 11 to reject a plaint are made out. **The issue of a commission prior to orders on a motion under Order VII Rule 11 of the Code is no more than a matter of priority in the discretion of the Trial Court.** The learned Trial Judge has not declined to decide the motion under Order VII Rule 11 of the Code, but merely said that the applications bearing paper Nos. 13 ¶ and 28 ¶ would be decided first in order. This is not a matter that this Court can be invited to interfere with, in the exercise of its jurisdiction under Article 227 of the Constitution.”*

22. Placing heavy reliance upon the above observation of the Court, Learned counsel Sri Vishnu Shankar Jain submitted that in the present case also the court is not declining for hearing and disposing of the application of the defendants 1 and 2. Their application would be heard once the objections against it are brought on record by the plaintiffs. He firmly but submissively urged that the application for rejection of the plaint does not raise any impediment to decide his application to appoint the commission.

23. He further submitted that so far as the argument of learned counsel for defendant no.1 and 2 referring to paragraph 23.15 of **Dahiben (supra)** is concerned, it is a general principle that has to be followed by the Court while deciding the application under Order VII Rule 11 of the Code. He argued that so far as the argument advanced by learned counsel Sri Punit Kumar Gupta that the Hon’ble Apex Court directed the District Judge, Varansi to decide the application under Order VII Rule 11 of the Code on priority basis is concerned, in the case, by that time the report of Advocate Commissioner was already available on record. Therefore, these

arguments do not support the case of the defendant no.1 and 2 in the present matter.

### Conclusion

24. Order VII Rule 11 of the Code provides as under:-

*“Rejection of Plaint- The plaint shall be rejected in the following cases;-*

*(a) Where it does not disclose a cause of action;*

*(b) Where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;*

*(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*

*(d) where the suit appears from the statement in the plaint to be barred by any law;*

*(e) where it is not filed in duplicate;]*

*(f) where the plaintiff fails to comply with the provisions of rule 9:*

*[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]”*

25. This Court does not find any substance in the submissions made by learned counsel for the defendant nos. 1 and 2 that the application for rejection of plaint should be decided first in order. Admittedly, the application for rejection of plaint was filed by the defendant no.1 and 2 on the date when the suit was fixed for hearing and disposal of the application filed by the plaintiffs for appointment of commission. An opportunity was accorded to learned counsel for the plaintiffs to file their objections against this application. Priority does not mean that the application of the defendant no. 1 and 2 for rejection of plaint should be decided without filing of the objections against it on behalf of the plaintiffs. The application for appointment of commission, which is pending since prior to the filing of application for rejection of plaint, cannot be ignored. The defendant no.1 and 2 have already filed their

objections against the application for appointment of commission. Trial is yet to be commenced. Only the defendant no.1 has filed its written statement on the earlier occasion. As of now, the application of defendant for rejection of plaint is not ready. On the contrary, the application filed for appointment of commission is ready for adjudication

26. The judgment of Hon'ble Apex Court passed in **Saleem Bhai (supra)** is followed subsequently in the cases **Dahiben case (supra)** and in **Kum. Geeta (supra)**. In these cases the Hon'ble Apex Court consistently held that the power under Order VII Rule 11 of the Code may be exercised by the Court at any stage of suit either before registering the plaint or after issuing summons to the defendant or before conclusion of the trial.

27. It is worth reiterating that the application under Order VII Rule 11 of the Code can only be decided once the plaintiffs filed their objections against it. Merely because an application for rejection of plaint is filed on the date of hearing and prayer is made that it is decided first in order does not necessarily mean that such request be accepted in the facts of this case. There is no, express or implied, bar in the Code prohibiting the court from deciding an application, otherwise ripe for hearing, only because an application for rejection of plaint is pending. Moreover, the argument advanced by learned counsel for the defendant no.1 and 2 is not supported with any judicial pronouncement.

28. Suffice to mention here that similar issue was dealt by this Court in **C/M Anjuman Intezamia Masajid Varanasi Vs. Rakhi Singh Others (supra)**. This Court observed that;-

*“The issue of a Commission prior to orders of motion under Order 7 Rule 11 of the Code is no more than a matter of priority in the discretion of the trial Court. The learned trial Court has not declined to decide the motion under Order 7 Rule 11 of the Code, but merely said that the applications bearing paper no.13C and 28C would be decided first in order.”*

29. In the present matter also the application for rejection of the plaint shall be disposed off after filing of the objection by the plaintiffs and after giving an opportunity of hearing to parties in accordance with the law.

30. This Court is reminded about the procedure being followed in the trial Court as a matter of policy. When a civil suit is presented before the Court, an application is often filed for appointment of Advocate or Court Amin as commissioner. In such application, a prayer is made to appoint an Advocate or Court Amin as commissioner to effect the service of suit upon defendant, to inspect the disputed property, to carry out the measurement of the property by meets and bounds, to prepare site plan of the property in suit and to submit its report. Generally, such application, is considered without waiting for appearance of defendant. This is so as appointment of commission will not effect the merit of the case and will not prejudice the right of the parties to the suit.

31. The limited observation made in **R.K. Roja Vs. U.S. Rayudu and Arn. (supra)** is concerned, the Hon'ble Apex Court held that once an application is filed under Order VII Rule 11 of the Code, the Court has to dispose off the same before proceeding with the trial. Admittedly, the trial has not yet commenced in the present suit. The defendant's, therefore, do not get any strength for the proposition urged by them on the strength of this judgement

32. This court is of the view that no straight jacket formula can otherwise be adopted or followed for prioritising which application should be decided first in order. It depends upon the fact and the circumstances of the individual case. Moreover, there is no provision in the Code which directs the court to give priority to one application over the other. The proceedings for appointment of commission and rejection of plaint are entirely independent proceedings.

33. In view of the above discussions and the observation made by the Hon'ble Apex Court and by this Court, as referred to above, this Court is of the opinion that the contentions of the learned counsel for the defendant no.1 and 2 that their application for rejection of plaint must be decided first in order before the disposal of the application for appointment of Commission cannot be accepted. The issue raised by learned counsel for the defendant no.1 and 2 is answered accordingly.

**Disposal of issue no. b)**

34. The matter relating to disposal of the application of appointment of Commission filed by plaintiffs is thus taken up, at this stage itself.

35. An application under Order XXVI Rule 9 & 10 r/w Section 151 of the Code is moved on behalf of the plaintiffs for appointment of a panel of three advocates as commission with the following prayer:

*“A. Appoint a commission consisting of three advocates with direction to submit report in the light of the averment made in the suit and in this application and the entire commission proceedings the photograph and videographed and the report be submitted in the time provided by the Hon’ble Court;*

*B. Police protection may be directed to be provided by the District administration and to maintain law and order situation during the survey proceedings.”*

36. It is pertinent to mention brief facts stated by the plaintiffs in their application for appointment of commission. In this application it is stated that Lord Krishna was born in *Karagar* of King Kans and the entire area is known as *Katra Keshav Dev*. The place of birth of Lord Krishna lies beneath the present structure raised by defendant no.2. In the year 1618 Raja Veer Singh Bundela of Orchha built the temple of Lord Krishna at his birth place. After the conquest of Agra and Mathura by Marathas in 1770’s, the Muslims were driven out of Mathura and the so called Mosque was removed and the temple was restored and renovated.

37. The grounds taken by the plaintiffs in their application for appointment of Commission of the property in dispute situated at *Katra Keshav Dev, Mathura* are that there are number of signs which establish that building in question is a Hindu temple. Some of the instances are narrated as:

*(a) at the top of the building one can observe a Kalash and a Pinnacle that exemplifies Hindu architectural style. This particular type of pinnacle and spire is not present on any Islamic structure;*

- (b) *Positioned just above the main gate there exists a pillar with a lotus shaped top, which is a classic characteristic of Hindu temples.*
- (c) *The image of Sheshnaag, one of the Hindu deities, is etched on the wall of the current structure. According to Hindu scriptures Lord Sheshnaag protected Lord Shri Krishna on the night of his birth.*
- (d) *At the base of the pillar in the present structure one can see visible Hindu religious symbols and engravings.*

38. It is also averred in the application that actual and factual aspect of the building are required to be brought before the court for effective adjudication of the case. The evidences available on the building can be placed before the Court only through photograph/videography which may be conducted by a commission appointed by the Court.

39. Objections against the application for appointment of commission are filed by defendant no.1 and 2 to the effect that the prayer made in application has no nexus with the prayer claimed in the original suit where the relief of cancellation of judgment and decree dated 20.07.1973 and 07.11.1994 is claimed. At this stage, no commission is required to be appointed to collect the evidence for adjudication of the dispute as it is contradictory to the main prayer of the plaint.

40. It is argued that the Shahi Idgah Mosque does not fall within the ambit of 13.37 acres land at Katra Keshav Dev. Place of birth of Lord Krishna does not lie beneath the Mosque. The claim of plaintiffs is based on guess work and is not substantiated by any documentary evidence. The plaint allegation that some time in 1770, the mosque was removed and the temple of Lord Krishna was restored and renovated, amounts to an admission on behalf of the plaintiffs regarding existence of mosque for long. It goes to prove that the mosque has not been constructed on the demolished temple of Lord Krishna since the Shahi Idgah Mosque never demolished since its construction in the 1600's. The disputed land is in continuous possession of the Muslim community since then and prayers are regularly offered till date.

41. It is categorically denied that designs in Mughal architecture resembles Hindu religious symbols or establishes that Shahi Idgah Mosque is a temple. The plaintiffs do not possess any evidence to substantiate their claim as mentioned by them in their plaint. This court cannot be made a tool to collect the evidence for plaintiffs. The application for appointment of commission is not in consonance with the relief claimed by the plaintiffs in their suit. All the averments made in the plaint are not substantiated with any evidence therefore, the application for appointment of Commission deserves to be dismissed.

42. Order XXVI Rule 9 and 10 of the Code provides that:

**9. Commissions to make local investigations.**—*In 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.*

**10. Procedure of Commissioner.**—(1) *The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

(2) **Report and depositions to be evidence in suit. Commissioner may be examined in person.**—*The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

(3) *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

43. Sri Vishnu Shankar Jain, Learned counsel for the plaintiffs submitted that there are number of signs which establish that building in question is a Hindu temple. A *Kalash* can be observed on the top of the building and the pinnacle exemplifies Hindu architectural style. A pillar exists above the main gate with a lotus shaped top and the image of Lord Sheshnag is etched on the wall of the current structure. Lord Sheshnag protected Lord Krishna on the night of his birth. Proper adjudication of the dispute without the actual and factual position of the building is not possible. The evidence available on the building can be placed before the Court only through photograph and videography to be conducted by the commission appointed by the Court and all such evidences cannot be proved or brought on record only by adducing oral evidence. Therefore, it would be expedient in the interest of justice to appoint a panel of three advocate commissioners with certain directions. The appointment of the commission and submission of report of the disputed property is not going to cause any harm or injury to any party to the suit, rather it would facilitate and crystallise each and every issue in the matter. It is also submitted that the defendants will have an opportunity to participate in the proceedings of the commission and they would be at liberty to file objections against the report of the commission if they feel aggrieved by the report of the commission. Learned counsel further argued that to protect the disputed property of the suit and to bring the actual and factual position of the property the appointment of commission is necessary.

44. Another straight forward argument is made by Sri Hari Shankar Jain and Sri Vishnu Shankar Jain, learned counsel for the plaintiffs that the object of Order XXVI rule 9 & 10 of the Code is not to collect evidence which can be adduced in court but to obtain material which from its very peculiar nature can best be had only on the spot. Such evidence enables the court to properly and correctly understand the issue, assess the evidence on record and clarify any point which is of doubtful nature. It also helps the court in deciding the question before it relating to identification, location, measurement, encroachment etc. of the property

in dispute. The Court has to consider the plaint as well the relief claimed by the plaintiffs before arriving at a conclusion. As per the averment made in the plaint it is need of the hour that the correct position of the property must be brought on record.

45. The learned counsel for the plaintiffs stated that the commission may be appointed at the time of filing of the suit and also in the absence of the defendant. Reliance is placed on ***Debendranath Nandi Vs. Natha Bhuiyan, AIR 1973 Ori 240*** referring to the following paragraph:

*“A Commissioner for local investigation is deputed under Order 26, Rule 9, Civil P. C when the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for ascertaining any other matter mentioned in the said rule. The object of local investigation under the above provision is to obtain evidence which from its peculiar nature can best be had from the spot itself. Such evidence enables the Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record. The trial Court's decision in the present case to depute a Commissioner for the above purpose is indicative of the fact that in view of the evidence before the Court it considered it necessary to obtain a report from the Commissioner about the correct and actual position of the disputed property. In view of the rival averments made by the parties and in view of the evidence on record, a Commissioner's report of local investigation was absolutely necessary in this case.”*

46. Learned counsel for the plaintiffs placed reliance upon **C/M Anjuman Intezamia Masajid Varanasi Vs. Rakhi Singh and Others, 2022 SCC Online All 396** to substantiate his argument for appointment of commission. The following paragraph are referred:

*“19. Apparently, the suit claims the existence of the named Deities on the property in dispute and that is a kind of evidence that would fall under the exception to the normal rule for issue of a commission, spoken of in **K. Raghunath Rao**. The existence or non-existence of the Deities on the property in dispute is a matter about which the parties under the circumstances can hardly produce evidence. Even otherwise, it is evidence which is to be found on the spot where the disputed property exists and can be best gathered therefrom. If the Court has exercised its discretion to issue a commission, so that evidence about the fact in issue can be collected, it cannot be said that the order is beyond jurisdiction of the Court under Order XXVI Rule 9 of the Code. It is not always that a commission is issued to elucidate evidence already on record. There can be cases where it is necessary to secure evidence, which is available on the spot and the parties cannot produce it. The commission issued here clearly falls into that*

*category. Quite apart, the commission does not, in any way, impinge upon the rights of the defendant-petitioner. If anything is said in the report of the learned Advocate Commissioner that the defendant-petitioner or any other defendant to the suit feels is contrary to the spot position, he can always object to the Commissioner's report, which would then be a subject matter for decision by the Court on the basis of evidence on record.”*

47. Learned counsel for the plaintiffs also heavily relied upon the judgment of Hon’ble Apex Court passed in **C/M Anjuman Intezamia Masajid Varanasi Vs. Rakhi Singh & Ors, SLP No. Of 2023 (Diary No.31345 of 2023)** and has submitted that the Hon’ble Apex Court has affirmed the order of this Court passed in petition Under Article 227 No.7955 of 2023 whereby the order of the District Judge, Varanasi allowing the application of the plaintiffs and issuing certain directions to the ASI to conduct survey of the property in that matter has been affirmed. Reliance is placed on the following paragraphs:

*“14. In terms of Order XXVI Rule 10, the Commissioner has to submit a report in writing to the court. The report of the Commissioner and the evidence taken by him constitute evidence in the suit and form a part of the record. However, the court and, with its permission, any of the parties may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in the report or as regards the report including the manner in which the investigation has been made.*

*The court is also empowered to direct such further inquiry if it is dissatisfied with the proceedings of the Commissioner. The evidentiary value of any report of the Commissioner is a matter to be tested in the suit and is open to objections including cross-examination. A report of the Commissioner does not by and of itself amount to a substantive finding on matters in dispute and is subject to the process of the court during the course of the trial.*

*15. At this stage, the court must notice that the District Judge while acting as a trial Judge in the suit exercised discretion under Order XXVI Rule 10A to direct a scientific investigation by the ASI. The order of the learned Trial Judge under Order XXVI Rule 10A cannot prima facie be construed to be without jurisdiction.*

*The High Court has found no reason to interfere, having set out the legal position which constrains the nature of the challenge under Article 227 of the Constitution while dealing with an interlocutory order of this nature. At the same time, the High Court has introduced certain safeguards which need to be reiterated in the course of the present judgment of this Court.”*

48. Concluding his arguments, learned counsel for the plaintiffs submitted that no harm or injury is going to be caused to the defendants if the commission is appointed by this Court, being the trial Court in the present matter. Commission report is always to be read subject to the objections and the evidence filed and led by the parties during the trial. The commissioner may also be called upon to depose as a witness during the trial and the defendant would have an opportunity to cross examine the commissioner. Therefore, for just and proper adjudication of the matter the appointment of the commission is expedient in the interest of justice.

49. Ms. Reena N. Singh, the learned counsel in original suit no.7/2023 titled as **Bhagwan Shri Krishna Lala Virajman and Anr. Vs. U.P. Sunni Central Waqf Board and Ors.** argued in support of the application for appointment of Commission. She submitted that the devotees are separated from the deities and are not able to have '*darshan*' regularly. The temple was dismembered and was destroyed during the Mughal reign. Major General Alexander Cunningham, the first director of Archeological Survey of India in his report titled as 'Report of a tour in Eastern Rajputana in 1882-83' mentioned about the heirs of Lord Krishna and Yaduvanshis. During her argument she reiterated the facts of the case noted in the plaint of the plaintiffs and also the arguments advanced by learned counsel for the plaintiffs in support of their application for appointment of commission.

50. Sri Nasiruzamman and Sri Mehmood Pracha, learned counsel for the defendant no. 1 and 2, while refuting the argument advanced by learned counsel for the plaintiffs, vehemently argued that plaintiffs has failed to show what irreparable and incalculable loss would be incurred to them if this court declines the application of the plaintiffs to appoint commission. The entire area of the property in dispute is heavily guarded by C.R.P.F., therefore, there is no possibility that any kind of harm or damage may be caused to the suit property. The plaintiffs moved this application only to highlight the matter in public eye.

51. It is further submitted that the cause of action, as disclosed by the plaintiffs in their plaint, can not be taken as gospel truth. The cause of action as stated in the plaint is that the plaintiffs were shocked to see that a Mosque was standing at the disputed place when they visited the temple on 15.01.2020 for *Darshan* of Bhagwan Shri Krishna at Mathura. The cause of action is completely false and imaginary because the plaintiffs bothered to visit to the temple in the year 2020 i.e. after almost 46 years of the judgment and decree dated 20.07.1973 which is challenged in this case.

52. It is also impressed upon that the suit was filed in the year 2020. The application for appointment of commission is moved in the year 2023 i.e. after almost three years. No reason has been assigned by the plaintiffs to move such application after a span of three years. The plaintiffs failed to show any urgency or harm caused to them which compelled them to move this application after such a delay. During this period, there is no change in the status of the property since the entire area is under heavy security. Virtually, the plaintiffs do not have any evidence with them. By virtue of the present application the plaintiffs intend to bring the evidence on record through photograph and videography which indicates that plaintiffs do not have any documentary evidence with them to prove their cause of action. The Court cannot be used as a tool to collect the evidence for any party. The averments made in the plaint as well in the application for appointment of commission are false and against facts and law.

53. The learned counsel for the defendant no.1 and 2 heavily relied upon the judgment of this Court passed in **MATTER UNDER ARTICLE 227 NO.4984/2023, Sri Krishna Janam Bhumi Mukti Nirman Trust Vs. Shahi Masjid Idgah Management Committee and 8 others** upholding the judgment and order of the trial Court refusing to appoint a commission under Order XXVI Rule 9 of the Code. It was also held that in a suit where its maintainability is questioned, then this fact has to be determined first.

54. In continuation, it is vehemently argued that the said judgment was challenged in an SLP filed by Shri Krishna Janambhoomi Mukti Nirman Trust being S.L.P. No.18551 of 2023 and vide its order dated 22.09.2023 the Hon/ble Apex Court was pleased to dismiss the aforesaid S.L.P. It is stated that the Hon'ble Apex Court also upheld the finding of this Court that the maintainability of the suit has to be determined first. Plaintiffs have travelled to Hon'ble Supreme Court on this issue but they did not get any relief. Concluding their arguments it is prayed that the application for appointment of commission be rejected.

55. In rebuttal, learned counsel for the plaintiffs Shri Vishnu Shankar Jain submitted that it is not correct to say that the judgment of this Court was upheld to the effect that the maintainability of the suit has to be determined first. Mr. Jain referred the following paragraph of the order passed by the Hon'ble Apex Court and argued that the Hon'ble Court left the matter to this court for adjudication since all the suits pending before the Court in Mathura were transferred to this Court. The Hon'ble Apex Court declined to interfere in the matter and dismissed the Special Leave Petition with the following observation:-

*“We are conscious of the fact that all related proceedings including the Suit in question stand transferred to the High Court by order dated 26.05.2023. However, the trial Court passed the order before such transfer took place and it cannot be said that the trial Court did not have jurisdiction to pass such an order.*

*The High Court, on transfer of all the cases the will do the trial and be the Court of first instance. That being the position, it cannot be urged, as the learned counsel for the petitioner submits, that the said Court alone should have exercised jurisdiction as a revisionary Court also against the order of the trial Court.*

*As to what is the consequence of transfer of the matters, whether the proceedings filed in other Suits under Order 26 Rule 9, CPC should be decided first, whether this suit should await that etc. are all matters to be considered by the High Court on transfer of the matter.*

*Thus, we are not required to exercise jurisdiction under Article 136 of the constitution of India, more so, against an interim order, as there are various issues at large which are pending before the High Court as a Court of first instance on transfer.*

**56.** It is submitted that in view of the above, the arguments advanced on behalf of defendant no.1 and 2 are not well founded that the issue of appointment of commission has finally been adjudicated in their favour by the Hon'ble Apex Court.

**57.** Learned counsel for the plaintiffs while replying to the arguments raised by learned counsel for defendant no.1 and 2, submitted that this Court cannot loose its sight from the following facts that:

- (a) Initially, when the suit was presented before the trial Court on 25.09.2020 it was registered as Misc. Case No.176/2020. It was heard on the point of its maintainability. Vide order dated 30.09.2020 the Misc. Case was dismissed.
- (b) Against this order, Civil Appeal No.17/2020 was preferred by the plaintiffs which was in turn converted into Civil Revision No.02/2021. The revision was allowed on 10.05.2022 by the then learned District Judge, Mathura and the trial Court was directed to pass appropriate order after hearing both the parties in the light of observation made in the judgment of the revision.
- (c) The trial Court registered the plaint of the plaintiffs as Original Suit No.353/2022 on 26.05.2022.
- (d) The suit was transferred by this Court vide order dated 26.05.2023 passed in TRANSFER APPLICATION (CIVIL) NO.28/2023 and is now registered as Original Suit No. 1/2023 in this Court.

**58.** Sri Jain, while referring to the above proceedings of the matter has submitted that there is no delay on the part of the plaintiffs in moving the application for appointment of commission. The present application is filed on the first date of hearing before this Court, therefore, the argument advanced on behalf of learned counsel for the defendant no.1 and 2 is not sustainable.

### Conclusion

59. It is a settled law that order XXVI Rule 9 of the Code enables the Court to appoint commission to hold local investigation for the purpose of elucidating a matter in dispute and to bring on record the actual and factual status of disputed property for just and proper adjudication of the dispute.

60. In **Anwar Batcha and another Vs S. Mahuedoom, 2014 SCC Online Mad. 642** it is held that;-

*“9. Rule 9 to Order XXVI of the Code of Civil Procedure envisages that 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.*

*10. From the texture of the languages coined in Rule 9 to Order XXVI C.P.C., it is explicit that it does not make any distinction between the plaintiff and the defendant or it does not have any reference to show that a particular party viz., either the plaintiff or the defendant alone shall file an application under Order 9 to Rule XXVI C.P.C., with a prayer to appoint an Advocate Commissioner. What it transpires is, where the Court deems a local investigation to be requisite or proper in any suit for the purpose of elucidating any matter, 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.*

*11. The expression 'elucidate' means to make lucid or clear, throw light upon, explain, enlighten. Where the Court is satisfied on the materials available on the record that a party is not able to produce the desired evidence for reasonable circumstances, it may assist the party to appoint a 'Commissioner' to get the evidence. However, such evidence is not binding on the Court, which is to appreciate the same along with other evidence. The party can 'countermand' the evidence of Commissioner's report by giving any other evidence. This dictum is laid down in Ankura & Ankura Charan Sahu v. Arjuna Charan Palei, reported in 1998 AIHC 1702 (Ori-DB). Besides this, in Debendranath Nandi v. Natha Bhuiyan, reported in AIR 1973 Ori 240, it is held that the object of local investigation under rule is to obtain evidence which from its peculiar nature can best be had from the spot.*

*12. The object of Order XXVI Rule 9 C.P.C., is not to assist a party to collect evidence where it can get the evidence itself, but*

*the real object is for elucidating any matter in dispute by local investigation at the spot.*

*13. In Payani Achuthan v. Chamballikundu Harijan Fisheries Development Co- operative Society, reported in AIR 1996 Ker 276, it has been held that the Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of the request of the party to appoint a Commissioner under Order XXVI Rule 9 C.P.C., to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. In a suit for injunction to restrain the defendants from interfering with the possession due to alleged encroachment into the land of the plaintiff, one of the methods to find out as to whether or not there is encroachment is to have the local investigation done by a competent Commissioner. Thus, in such a case Trial Court was not right in rejecting the prayer for appointment of Commissioner.”*

61. It is pertinent to mention here that in the proceedings for appointment of commission by the Court, the defendants can participate. Moreover, if they feel aggrieved by the report of the commission, they have an opportunity to file their objections against the said report. The report filed by the commissioner is always subject to evidence of the parties and is admissible in evidence. The commissioners are competent witness and they may be called for evidence during the trial, if desired by any party to the suit. The other party will always have an opportunity to cross examine them.

62. It is also to be kept in mind that by appointment of a panel of three advocates as commission, either party would not suffer any harm or injury. The commissioner report does not effect the merits of the case. It is also to be noted here that during the execution of the commission, the sanctity of the campus can be directed to be maintained strictly. Further it may be directed that no harm or injury be caused to structure in any manner. The commission is duty bound to submit its fair and impartial report on the basis of the actual status of the property. The commission may also submit its discovery as to existence of particular signs at the property as referred by the plaintiffs. The representative of the plaintiffs as well the defendant may accompany the panel of the advocates to be

appointed as commission to assist them so that the correct position of the spot may be noted and be brought before the Court.

**63.** So far as the objections raised by learned counsel for defendant no.1 and 2 about the cause of action is concerned it is a settled law that the cause of action is to be proved by the plaintiffs by evidence otherwise their suit will fail. The cause of action is bundle of facts which plaintiff has to prove to succeed in his suit. At the time of disposal of the application for the appointment of Commission the cause of action is not to be examined since burden of proof lies upon the plaintiffs to prove their cause of action by evidence, which stage shall arise only, later.

**64.** So far as the argument of the learned counsel for the defendant no.1 and 2 is concerned, that the suit was filed in the year 2020 and the application for appointment of Commission is preferred in the year 2023 and no reason is assigned by the plaintiffs for such delay, this court does not find any substance in this argument in view of the chain of proceedings from filing of the suit before the trial court, its rejection, proceedings before the revision court and thereafter registration of original suit on 26.05.2022. Thereafter, all the suits pending before the trial court involving the same subject matter were transferred to this Court which is not disputed on behalf of the defendants. The application for appointment of commission is filed by the plaintiffs on the first date of hearing before this Court. Moreover, the application for appointment can be moved by any party to the suit at any stage and any time during the pendency of the suit. Even otherwise, if the application for appointment of commission is allowed by this court, the rights of the defendants would not be prejudiced in any way.

Therefore, it is concluded that the prayer for appointment of commission by the plaintiffs cannot be refused on the ground that it is filed after delay of almost three years.

**65.** Considering the facts of the case, preposition of the law, the arguments advanced by the learned counsel for the parties, the

observation made by Hon'ble Apex Court and this Court, the application 130C moved by plaintiffs under Order XXVI Rule 9 & 10 read with section 151 of the Code deserved to be allowed.

**66.** Accordingly, the application No. 130 C of the plaintiffs to appoint commission is hereby **allowed**.

**67.** So far as the modalities and composition of the commission is concerned, this Court feels it proper to hear the learned counsel for the parties for such purposes.

**68.** Let this matter be listed on 18.12.2023 at 2.00 pm for hearing.

**Order Date: 14.12.2023**

Mohit Kushwaha