

GAHC010032442020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/48/2020

MUKTINATH SONOWAL (CHUTIA)
S/O- LT. MOHAN CH. SONOWAL, R/O- NATUN NAGAR, MORAN TOWN, P.O.
AND P.S. MORAN, DIST- DIBRUGARH, ASSAM.

VERSUS

SARIFAT ALI AND ANR.
S/O- LT. PHEDUA ALI, R/O- MORAN TOWN, W/NO. 6, P.O. AND P.S.
MORANHAT, DIST- SIVASAGAR (ASSAM).

2:MORAN TOWN COMMITTEE
MORAN TOWN
P.O. AND P.S. MORAN
DIST.- SIVASAGAR (ASSAM). (NOTICE TO BE SERVED UPON THE
CHAIRMAN
MORAN TOWN COMMITTEE)

Advocates for the petitioners : Mr. M. Khan

Advocates for the respondents : Mr. B. J. Ghosh

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 14.06.2023

Date of Judgment & Order : 26.06.2023

JUDGMENT & ORDER (CAV)

Heard Mr. M. Khan, learned counsel for the petitioner. Also heard Mr. B. J. Ghosh, learned counsel for the respondent No. 1.

2. This civil revision petition, under Article 227 of the Constitution of India, is preferred against the order dated 21.11.2019, passed by the learned Civil Judge, Sivasagar, in Title Appeal No. 13/2016, whereby, the learned Civil Judge rejected the prayer for appointment of local commission.

3. The brief facts of the case is that the petitioner instituted a suit, being Title Suit No. 33/2007, before the Court of learned Munsiff, Charaideo at Sonari, seeking decree of declaration of his right, title and interest as well as recovery of khas possession along with permanent injunction in respect of the land mentioned in the Schedule of the plaint. After receipt of the summons, the respondents/defendants also contested the case by filing their separate written statement. However, after conclusion of the trial, the learned Munsiff, Charaideo, vide its judgment and order dated 30.03.2017, dismissed the suit of the plaintiff/petitioner. Thereafter, the petitioner preferred an appeal against the said judgment and order of the learned Munsiff, Charaideo, which is numbered as Title Appeal No. 13/2017 and pending before the Court of learned Civil Judge, Sivasagar. The suit was basically for a plot of land measuring 3 feet in breadth and 64 feet in length and 18 feet in length and 13 feet is breadth in southern and eastern side of the commercial building, respectively, i.e. the Schedule-B, which is allegedly the part of Schedule-A land.

4. The main dispute between the parties is for the Schedule-B land, which is the part of Schedule-A and adjacent land of respondent No. 1/defendant. Although, both the parties adduced their evidence to prove their respective cases, but as the main dispute is the boundary dispute between the parties, i.e. Schedule-B land, therefore, appointment of Commission to make investigation for the purpose of elucidating the said boundary dispute is very much necessary for all purpose. Under that circumstances, the petitioner filed an application under Order XXVI Rule 9 *read with* Section 151 of the Code of Civil Procedure with a prayer for appointment of Local Revenue Authority as Commissioner to make investigation by measuring the land under the possession of the plaintiff/petitioner, i.e. the Schedule-A land, as well as the adjacent land under the possession of the defendant/respondent No. 1. But the learned Court below, without considering the ground mentioned by the petitioner for appointment of Commission, mechanically rejected the application with an observation that "when respondent has admitted the ownership of Schedule-A land to be appellant and when Schedule-A land includes Schedule-B land, no local investigation is necessary."

5. Being highly aggrieved and dissatisfied with the impugned order dated 21.11.2019, passed by the learned Civil Judge, Sivasagar, in Title Appeal No. 13/2016, the petitioner/plaintiff preferred the present revision petition on the following grounds, amongst others:-

- (i) That the impugned order dated 21.11.2019, passed by the learned Civil Judge, Sivasagar, in Title Appeal No. 13/2016, is erroneous, bad in law, perverse and based on misappreciation of law and fact and

the same is liable to be set aside.

- (ii) That the learned Court below failed to understand that although the respondent No. 1, in his cross-examination, admitted the ownership of the appellant over the Schedule-A, but they never admitted that Schedule-B has a disputed boundary within the Schedule-A land and as such, the finding of the learned Court below is not tenable and hence, the same is liable to be set aside.
- (iii) That the learned Court below also failed to appreciate the fact that the local investigation is very much essential for proper adjudication of the matter between the parties and such, the impugned order dated 21.11.2019, passed by the learned Civil Judge without exercising the jurisdiction vested under Order 26 Rule 9 of CPC and mechanically rejected the prayer for appointment of Commissioner.

6. The learned counsel for the petitioner, Mr. M. Khan, relied on the decision of Hon'ble Orissa High Court in **Nakula Sahu Vs. Suresh Chandra Beherdolai & Ors.**, reported in **2016 STPL 1193 Orissa**, wherein, it has held that "alleged encroachment of defendant on suit property – There appears to be a boundary dispute between two parties – which cannot be finally resolved without conducting measurement of the suit plot and adjoining plot by a survey knowing person – So for final and effective adjudication of dispute, it is necessary to appoint the Survey Knowing Commissioner for demarcation of the land."

7. The learned counsel for the petitioner also relied on the decision of Tripura

High Court in **Kanchanthung Halam & Anr. Vs. Mallika Das & Ors.**, reported in **2017 Legal Eagle (TRI) 191**.

8. Further, the learned counsel for the petitioner has submitted that there cannot be any bar for appointment of Amin Commission or Local Commissioner even at the appellate stage and in this context, he also relied on decision of Hon'ble Himachal Pradesh High Court reported in **2016 Legal Eagle (HP) 587 (Sant Ram & Anr. Vs. Nikra Ram)**, wherein, in paragraph No. 21, it has been held as under:

“21. This Court is of the view that, learned first appellate Court rightly resorted to provisions of Order 26, Rule 9 CPC and appointed Local Commissioner to adjudicate the boundary dispute for all times to come. Otherwise also plain reading of aforesaid provision of law nowhere suggests that learned first appellate Court is/was not empowered to appoint Local Commissioner in terms of the Order 26, Rule 9 CPC. This Court is of the view that there is no bar at all for the appellate Court to appoint Local Commissioner during the pendency of the appeal but in this case, defendants are estopped from their conduct from raising this plea because if they were really aggrieved with the appointment of Commissioner, they had an alternative remedy of assailing the same before the competent court of law by resorting to provisions of 115 CPC, which they never invoked. Similarly, objections filed by them to the report itself suggest that no procedural irregularity was committed by the Local Commissioner at the time of carrying out demarcation in terms of order passed by the first appellate Court.”

9. In this context, the learned counsel for the respondent, Mr. B. J. Ghosh, submitted that the boundary dispute was not an issue in this case and the appointment of Commissioner cannot be claimed by either parties as a matter of right. It is the discretion of the Court to appoint Amin Commission or Local Commissioner if the Court finds it necessary. Refusing to appointment of a Commissioner has nothing to do with the right of the petitioner as such. It is the

discretion of the Court and only for refusing the appointment of a Commissioner, it cannot be held that there is any prejudice caused to the petitioner. More so, under Order 26 Rule 9, the Court does not decide any issue nor adjudicate any right of the parties. However, the Court can appoint an Amin Commissioner if it finds necessary by the Court after production of evidence of the parties. The petitioner has already led his evidence in Title Suit No. 33/2007, but failed to establish his right over the suit land and the learned Munsiff had dismissed the suit of the plaintiff after considering all the evidence on record. It is also seen that the petitioner in cross-examination admitted that at the time of purchase of the Schedule-A land the RCC building over it and the shop house at the adjacent land of the defendant No. 1 were adjacent to each other and there is no space between the southern side of said building and shop house of the defendant No. 1 and as such, it is an established fact that there is no space between the southern boundary of the Schedule-A land of the defendant No. 5 (respondent No. 1) and accordingly, it is held that there is no possibility of alleged encroachment as no suit land (Schedule-B) exists. Accordingly, it is submitted that the learned Civil Judge rightly dismissed the prayer for appointment of Amin Commissioner considering the materials on record and submission made by the parties.

10. It is further submitted by the learned counsel for the respondent that by appointing an Amin Commissioner, the petitioner cannot be allowed to collect evidence at this stage and in this context, the learned counsel for the respondent also relied on a decision of this Court reported in **2017 4 GLT 177 (Rajib Barooah Vs. Purnimati Plantation Pvt. Ltd. & Ors.)**, wherein, in paragraph 10 thereof, it has been held as under:

"10. In paragraph 10 of the said Evidence- on- affidavit filed by the petitioner/ plaintiff, it is specifically stated that if the fresh survey is done, then it would reveal the difference in the topography and large scale of damage to the Tea Estate and Tea plantation, which was in violation of the lease deed. Therefore, in the opinion of this court, it is noticeable that the real intention of the petitioner/ plaintiff is to fish-out evidence. In this regard, the case of K. Raghunath Rao (supra), cited by the petitioner, is of no help to the petitioner. The survey is not necessitated for explaining any fact, but to find out the evidence. But, as per the ratio of the cited case, a Commission may be allowed if it explains the evidence, which is already on record, which is not the case in hand. In the present case, the petitioner/ plaintiff did exhibit the Survey Commission Report as Ext.20, but it was of a period prior to the institution of the suit. It is not the projected case of the petitioner that he did not have the access to the Tea Estate or was prevented from carrying out such a survey and, as such, no evidence could be produced to portray true picture of the suit property before the Court, rather, it is the pleaded case of the petitioner/ plaintiff that the respondent/ defendant had changed the topography and, as such, it would be the initial burden of the plaintiff to prove the said statement. There is total absence of reason why the petitioner/ plaintiff could not carry out the exercise of survey of his own, when he had relied on the report of a previous survey (Ext.20), which was done by the same surveyor, named in his petition. At this stage, it is deemed fit to quote the relevant paragraph 9 of the said case of K. Raghunath Rao (supra):

"9. "..... 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....."

The aforesaid passage makes it clear that local investigation by a Commissioner can be made in exercise of the power under Order 26, Rule 9, C.P.C. where visit to the spot is necessary. That would be a local investigation requisite or proper. When the report would be necessary to appreciate the evidence on record, a commission can be issued in proper case. Therefore, normally writ is to be issued to a Commissioner for local investigation to appreciate the evidence already recorded. There may be departures from the normal rule for issue a commission also. For illustration : Where evidence is necessary to know the depth of water in a particular season a Commissioner can be deputed even though evidence has not been recorded. Where it is to be found as to on which plot the disputed land lies, a writ can be issued to any person to relay the same even though no evidence is required if the Court finds that the parties themselves cannot produce evidence to that effect. Since issue a writ to a person for local investigation would depend upon the facts and circumstances of each case, no hard and fast rule can be laid down. This much can be said that the basic pre-requisite for issue of such a writ

is the satisfaction of the Court that a local investigation is requisite or proper. This satisfaction is to be judicial satisfaction based on reason."

11. The learned counsel for the respondent accordingly, submitted that the learned Civil Judge has rightly rejected the prayer for appointment of Amin Commission and there is no requirement of appointment of any Amin Commission when there is available evidence on record to determine the dispute between the parties.

12. After hearing the submissions made by the learned counsels for both sides, it is seen that the claim of the petitioner is that the disputed land is the Schedule-B land which is under the Schedule-A land and the land of the respondent No. 1 is adjacent to the Schedule-A land where they trying to encroach upon the land of the petitioner. But, considering the evidence on record, the learned Munsiff, Charaideo, dismissed the suit of the plaintiff/petitioner, against which they preferred an appeal, which is still pending before the learned Civil Judge, Sivasagar. During the pendency of the said appeal, the petitioner/plaintiff filed an application for appointment of Local Commissioner to survey the land. But, vide order dated 21.11.2019, the learned Civil Judge, Sivasagar, rejected the prayer for appointment of Amin Commissioner with a view that the parties have already adduced their evidence and their witnesses are also been cross-examined. And, in the same time, it is also the admitted fact that the petitioner/plaintiff is the owner of the Schedule-A land, which includes the Schedule-B land, and their dispute is only on the southern and eastern boundary of the Schedule-A land which is also admitted by the respondent and hence, it cannot be stated to be any boundary dispute between the parties and accordingly, the learned Civil Judge, Sivasagar, rejected

the prayer for appointment of Amin Commission.

13. From the discussions made above, it is seen that the parties have already adduced their evidence before the learned Munisff, Charaideo, and in the same time it is the case of the plaintiff that the suit land, which is mentioned in the Schedule-B of the plaint, is under the Schedule-A land, and there is no dispute about the ownership of the Schedule-A land and it is also admitted by the respondent that the petitioner is the owner of the Schedule-A land and in regards to dispute on the southern and eastern boundary, it is also admitted by the respondent and hence, in such a situation only to collect some evidence by the local investigation is felt not necessary at this stage.

14. Order 26 Rule 9 of the Code of Civil Procedure provides that it is the discretionary power of the Court to appoint a Commissioner or make any order for local investigation only in a case when the Court finds for a local investigation for the purpose of elucidating any matter in dispute or to ascertain the market value of any property etc.

15. For ready reference, Order 26 Rule 9 of the Code of Civil Procedure reads as under:

“9. Commissions to make local investigations - 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:

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.”

16. Here in the instant case, from the discussion made above, it is very much evident that it is not disputed that the plaintiff/petitioner is the owner of the Schedule-A land which includes Schedule-B land and dispute on southern and eastern boundary is also an admitted position and in that case, I find that appointment of Amin Commission is not at all necessary. More so, by appointing an Amin Commission, it cannot be directed to gather evidence when there is no ambiguity in the description of the suit property. Further, it is seen that the suit land is properly identifiable and it is also admitted fact that the dispute arose only on the southern and eastern boundary of the Schedule-A land. Whether there is any encroachment by the defendant or by the respondent No. 1 etc. are the questions to be determined at the final hearing of the case. But, upon considering the entire facts and circumstances of this case, it is seen that the learned Court below rightly rejected the prayer for appointment of commission for local investigation over the suit property and hence, I find that there is no requirement of any interference by this Court in the order dated 21.11.2019, passed by the learned Civil Judge, Sivasagar, in Title Appeal No. 13/2016.

17. In the result, I find no merit in this petition and the accordingly, the same stands dismissed.

JUDGE

Comparing Assistant