

Neutral Citation No. - 2023:AHC:201490

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 9259 of 2023

Petitioner :- Brijmohan Singh Sirohi And 4 Others

Respondent :- Pawan Singh Sirohi

Counsel for Petitioner :- Kaushal Kishor

Hon'ble Jayant Banerji,J.

1. Heard learned counsel for the petitioners.
2. This petition has been filed seeking the following relief:-

"i. Issue an appropriate order or direction to set aside an order dated 27/07/2023 passed by District Judge, Saharanpur in case revision no.Nil of 2023 Brijmohan Sirohi Versus Pawan Singh Sirohi in connection O.S. No.423 of 2021 Pawan Singh Sirohi versus Brijmohan Sirohi and others. order 10/07/2023 passed by Civil Judge (J.D.) Nagar Saharanpur."

3. It appears that the plaintiff-respondents filed Original Suit No.423 of 2021 in the court of the Civil Judge (Junior Division), Saharanpur seeking a decree of cancellation of a Will-deed dated 03.06.2013 as well as a decree of permanent injunction for restraining the defendants from interfering in the peaceful possession of the plaintiffs on 1/4th part of the property in question. In the aforesaid suit, an application paper no.51-C2 was filed seeking status report of the site in question from the Court Amin. By the impugned order dated 10.07.2023, the application 51-C2 was allowed. The petitioner-defendants challenged the aforesaid order dated 10.07.2023 by filing a civil revision in the court of the District Judge, Saharanpur. By another impugned order dated 27.07.2023, the revision was dismissed at the admission stage itself holding that the order dated 10.07.2023 is an interlocutory order and, therefore, the revision is not maintainable.

4. The contention of the learned counsel for the petitioners is that the order of the revisional court and the order of the trial court dated 10.07.2023 deserve to be set aside. It is contended that a coordinate Bench of this Court in the case of **Km. Chandana Mukherjee vs. Additional District Judge**¹, had dismissed a petition challenging an order passed by the trial court rejecting an application for issuance of commission under Order XXVI Rule 9 CPC, as well as the order dated 31.01.2020 passed by the revisional court dismissing the revision. It is contended that in that judgment, it was held that the application for issuance of commission to conduct an investigation and examination regarding possession of parties to a dispute would not be maintainable in terms of Order XXVI Rule 9 CPC, particularly when there is no explanation furnished by the plaintiff therein that he could not have an access to any documents required for proving his possession over the suit property. It was also held that it is impossible for a commission to decide possession of a particular party to dispute over the suit property only on the basis of a cursory examination. In that judgment, it has also been held that applications under Order XXVI Rule 9 cannot be allowed merely for purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge burden of evidence of either party.

5. This Court is in respectful agreement with the observation of the coordinate Bench in Matters under Article 227 No.6654 of 2020 that applications under Order XXVI Rule 9 cannot be allowed merely for purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge burden of evidence of either party.

6. A Court Amin can be appointed under the provisions of Order XXXIX Rule 7 CPC or a commission can be issued by the court to such person as it thinks fit under Order XXVI Rule 9 CPC. The

¹ Matters under Article 227 No.6654 of 2020, decided on 03.03.2023 (Lucknow Bench)

purpose of appointment of an Advocate Commissioner or the Amin to make a spot inspection is also referable to the provisions of Section 75 of the CPC which empowers the court to issue commission. A commission can be issued by the court to make local investigation under clause (b) of Section 75 CPC. There are other purposes mentioned in that Section for which purposes the court can issue commissions. Order XXVI Rules 9 and 10 provide for commissions for making the local investigation and the procedure to be adopted by the commission. Under Order XXXIX Rule 7, the Court has been given the power, *inter alia*, to make an order authorising any person to enter upon or into any land or building in the possession of any other party to the suit on the application of any party to the suit and on such terms as it think fits, for purpose of inspection of any property which is the subject matter of such suit or as to which any question may arise therein. Such a power that is vested in the court pursuant to the aforesaid provisions is to be exercised not for purposes of discharging burden of evidence of either party but to obtain information through a commission from the Court Amin or Commissioner to conduct an investigation. The power of the court to issue a commission cannot be rendered otiose.

7. In the present case, the application for appointment of the Court Amin to submit a report alongwith a map has been allowed by the order dated 10.07.2023. The application for issuance of commission is enclosed as Annexure-3 to this petition, in which it is prayed as follows:-

"अतः सादर प्रार्थना है कि उक्त वाद में अमीन अदालत को नियुक्त किया जाकर निर्देशित किया जावे कि वे उक्त बाद में लिप्त प्रश्नगत सम्पत्ति का स्थल निरीक्षण करके उसकी यथास्थिति की रिपोर्ट मय नक्शा नजरी/पैमायशी माननीय न्यायालय द्वारा निर्धारित समय सीमा के अन्तर्गत प्रस्तुत करे तथा जो तथ्य वादी या उसके पैरोकार द्वारा मौके पर अमीन महोदय को दिखाये जाये एवं बताये जाये, उनको भी अपनी रिपोर्ट व नक्शे में प्रदर्शित करे।"

8. Therefore, the application has sought spot inspection and to submit a report as to the position existing.

9. In view of the aforesaid, the order passed by the trial court as well as the order passed by the revisional court call for no interference.

10. This petition is, accordingly, **dismissed**.

Order Date : 18.10.2023
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(Jayant Banerji, J)