

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.107 of 2019

=====

Musafir Mahto S/o Late Uttim Mahto Village-Jado Rahimpur, P.O. and P.S.-
Marhaura, Distt.-Saran

... .. Appellant

Versus

1. Hardeo Mahto, S/o Late Jawahir Mahto
2. Most. Fuleshwari Kuer, W/o Late Sukul Mahto
3. Sakaldeep Mahto S/o Late Sukul Mahto
4. Sudarshan Mahto S/o Darvesh Mahto
5. Most. Lalita W/o Late Shiv Mahto
6. Shivaratan Mahto S/o Late Tappu Mahto
7. Ramnajar Mahto S/o Late Patiram Mahto

All are Resident of Village-Jado Rahimpur, P.O. and P.S.-Marhaura, Distt.-
Saran

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Nagendra Rai, Advocate
For the Respondent/s : Mr.

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 24-01-2019

Heard Learned counsel for the petitioner.

2. This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 06.08.2018 passed by the learned Sub-Judge-III, Chapra in Title Suit No. 483 of 2014, whereby the application dated 03.05.2017 filed by the petitioner for appointment of survey knowing pleader commissioner has been rejected.

3. Learned counsel for the petitioner submitted that the court below has erred in holding that without adjudication of title appointment of survey knowing commissioner is not



justified. He submitted that the scientific measurement of the encroachment made by the respondents would facilitate in adjudicating the dispute between the parties. However, the court below failed to appreciate that no effective decree in a suit for removal of encroachment can be passed without scientific measurement of the encroachment alleged. He further contended that the court below completely ignored the statutory provisions of Order XXVI Rule 9, 10 and 10-A of the Code of Civil Procedure (for short 'CPC') while passing the impugned order.

4. The petitioner is the plaintiff. He has filed Title Suit No.483 of 2014 in the court of Sub Judge-III, Chapra against the respondents who are defendants in the court below. He has sought relief for declaration of his title over land mentioned in schedule 'kha' of the plaint and further declaration that sale deed dated 30.11.2012 by the respondent no.2 to respondent no. 1 regarding plot nos. 9 and 204 is illegal. He has also prayed for recovery of possession for 17 dhoores of southern portion of schedule 'kha' plaint land. The respondent nos. 2, 4 and 5 are not the contesting parties. The respondent no.1 is the contesting defendant, who has denied the claim of the petitioner and defended his sale deed as genuine, legal, valid and for consideration.



5. The petitioner filed an application on 03.05.2017 in the said suit for appointment of a survey knowing pleader commissioner for scientific measurement of schedule 'kha' land and the extent of encroachment.

6. The respondent no.1 filed rejoinder on 14.07.2017 opposing the aforesaid prayer on the ground that scientific measurement is not required in view of plaintiff's specific pleading about the encroached land and also in view of the question of title of parties being involved.

7. After hearing the parties, the court below, vide impugned order, dated 05.08.2018, rejected the application of the petitioner, dated 03.05.2017, on the ground that till the title and the question of legality of the sale deed in favour of respondent no. 1 is not decided, there is no requirement for conducting any measurement of land by a survey knowing pleader commissioner. While rejecting the application, the court below also observed that the application has been filed by the petitioner just in order to collect evidence in his favour.

8. Order XXVI Rule 9 of the CPC provides 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 *mense* profits or damages or annual net profits, the Court may issue commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

9. Order XXVI Rule 10 of the CPC provides for procedure to be adopted by the Commissioner in the matter of conducting an inquiry.

10. Rule 10-A of Order XXVI of the CPC provides that where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks necessary or expedient in the interests of justice to do so, issue a commission to such person it thinks fit, directing him to inquire into such question and report thereon to the Court.

11. A perusal of Order XXVI Rule 9 and 10-A of the CPC would make it clear that the courts have been given discretionary power to appoint pleader commissioner in case the court deems a local investigation to be requisite or proper for determination of the issues in the suit.

12. The object of Order XXVI, Rules 9 and 10A of the CPC is not to assist a party to collect evidence where the



party can procure the same. The appointment of Advocate Commissioner can not be made for making enquiry about the factum of possession of the property. Such issue has to be adjudicated upon framing issues on application of evidence. As a matter of fact, for the purpose of elucidating facts in respect of any matter in dispute where the circumstances make it expedient in the interest of justice to do so, the Court may appoint Advocate Commissioner. The power of the Court, in this regard, is discretionary in nature, which the Court has to exercise judicially for the purpose of ascertaining certain facts, to make it clear and to throw light upon the issue.

13. It is well settled position in law that it is not the business of the court to collect evidence in favour of the party.

14. In the instant case, in the suit before the court below, the issue involved is of determination of title as also legality and validity of the sale deed executed in favour of respondent no. 1 by the respondent no. 2, and if the court below did not find any necessity to appoint pleader commissioner for scientific measurement of land alleged to be encroached by the respondent no. 1 by the petitioner, no illegality can be found with the order.



15. In that view of the matter, I see no reason to interfere with the order impugned in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

16. The application is dismissed.

(Ashwani Kumar Singh, J.)

Sanjeet/R.Ranjan-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	28.01.2019
Transmission Date	NA

