

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

CO 2 of 2019

Smt. Pinki Paul (Gunin)
Vs.
Smt. Shaunibala Roy & Ors.

Mr. Pintu Kumar Deb
Mr. Swarup Mondal
... For the petitioner

This revisional application arises out of an order dated 7th February, 2019 (Order No.16) passed by the learned Civil Judge (Senior Division) at Jalpaiguri in Title Suit No.62 of 2017. The said Title Suit No.62 of 2017 is a partition suit filed by Smt. Shaunibala Roy, who is the opposite party no.1 in the instant revisional application.

The case of the plaintiff/opposite party no.1 in the partition suit is that Falin Roy also known as Falin Sing Roy, the plaintiff's father and Nalin Roy jointly held the suit property. After the death of Nalin Roy, his share in the suit property devolved unto his two sons, Kenal Roy and Senal Roy, being the defendant nos.1 and 2 in the said partition suit and the opposite party nos.2 and 3 in this revisional application. It is also the plaintiff's

case that after the death of Falin Roy, his share in the suit property devolved unto the plaintiff Shaunibala Roy, Paneswari Roy (opposite party no.4), Asaru Roy (opposite party no.5) and Sabitabala Roy (opposite party no.6). Paneswari Roy is the widow of Falin Roy also known as Falin Sing Roy whereas the plaintiff and Sabitabala Roy are the two married daughters of Falin Sing Roy. Asaru Roy is the son of Falin Sing Roy. The petitioner is an outsider to the Roy family and has been impleaded as defendant no.6 in the partition suit. Petitioner's husband is defendant no.7 in the partition suit.

Records reveal that Asaru Roy, the opposite party no.5, had instituted a Title Suit, being Title Suit No.105 of 2017, inter alia, seeking declaration of his right, title, interest and possession over the suit land mentioned in the schedule of the plaint filed in that suit. He had also prayed for other consequential reliefs. This suit was filed sometimes in May, 2017 and according to the petitioner is the first suit in order of time between the parties to this revisional petition.

The petitioner, being the defendant no.6 in the partition suit filed a suit, inter alia, for declaration and perpetual injunction, being Title Suit

No.108 of 2017. According to the petitioner, the said suit is the second suit between the parties in order of time which was filed on or about 15th May, 2017. The partition suit is the third suit in order of time according to the petitioner.

In the suit filed by the petitioner, an application under Order XXXIX Rules 1 and 2 was filed which has been allowed and, as such, the possession of the petitioner in respect of the suit property mentioned in the plaint filed in the suit instituted by the petitioner is protected. In the partition suit, an application under Order XXXIX Rules 1 and 2 was filed wherein an ad interim order of status quo was passed. According to the petitioner, the ad interim order of status quo was vacated in an application filed by the petitioner under the provisions of Order XXXIX Rule 4. The injunction application filed in the partition suit is pending final hearing.

The petitioner in the partition suit has taken out an application under Order XXXIX Rule 7 read with Section 151 of the Code of Civil Procedure, 1908 for appointment of an Advocate Commissioner to determine the following points:-

“(a) What is the present possession and nature and character of the suit property;

(b) To see and note the local feature of the suit property;

(c) To submit a report by the Commissioner in this Hon’ble Court in terms of points (a) & (b) above.”

The allegation forming the basis of the application under Order XXXIX Rule 7 is that the plaintiff in the partition suit was never in possession of the suit property and the petitioner was and still is in possession of the suit land, the schedule of the plaint describing the property in the partition suit does not bear any boundary and, as such, it does not justify any relief to be granted to the plaintiff. The petitioner further says that for determining the real controversy of the suit property, an Advocate Commissioner is to be appointed to inspect the suit property and until and unless the suit property is inspected by the Commissioner, the hearing of the injunction petition filed by the plaintiff in the partition suit cannot be disposed of.

It is, therefore, evident that there are three suits which are pending. None of the suit has proceeded to the stage of evidence. Each of the suits relates to possession as claimed by the plaintiff(s) in

the respective suits. The contention of the plaintiff/ plaintiffs in the three suits as appears from record is opposed to each other. The injunction application filed in the partition suit can be decided on its own merit as per claim and counter-claim by the parties. There is no need at this stage for a Commissioner's report to adjudicate the same. On the contrary, if a Commissioner is appointed, his report may be used by the parties as evidence in support of possession in the other two previously instituted suits which are also in respect of possession of a portion of the suit property involved in the partition suit. It is well settled principle that a Court cannot be used as a mechanism to collect evidence for any of the parties. The appointment of Commissioner and seeking a report from him as to the possession and nature and character of the suit property will definitely amount to fishing of evidence, particularly when the two other suits are pending trial. That apart and in any event, the application under Order XXXIX Rule 7 is vague as to its point of reference and if allowed will amount to grant of an omnibus relief through which evidence as to possession can be collected.

The learned Court below was absolutely within its jurisdiction to reject the application under

Order XXXIX Rule 7. Cogent reasons have been provided for rejecting the said petition after relying upon a judgment delivered by this Court. Three suits as stated hereinabove are pending. Allowing an application under the provision of Order XXXIX Rule 7 at this stage will really amount to fishing of evidence. This is impermissible and, as such, the said application was rightly rejected.

After considering the order impugned and the submission made on behalf of the petitioner, I find that the order impugned requires no interference.

The revisional application is dismissed for the reasons as aforesaid.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Arindam Mukherjee, J.)