

20.06.2019.
Item No. 1

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI.

C.O. 4 of 2019

Bimala Devi Agarwal and others.
Vs.
Sri Inder Chand Agarwal.

Ms. Rima Sarkar,
Ms. Ridhi Sethia.

... for the petitioners.

This revisional application is directed against an order dated 6th February 2019 passed by the learned Civil Judge (Junior Division), Siliguri in Title Suit No. 111 of 2018, by which an application under Order XXXIX Rule 7 of the Code of Civil Procedure is rejected.

The plaintiffs/petitioners filed a suit for declaration that the subject property is a common passage and to be used as driveway and permanent injunction restraining the defendant/opposite party from creating any obstructions and/or hindrances in peaceful enjoyment thereof.

It is evident from the instant revisional application that the application for temporary injunction was disposed of directing the parties to maintain *status quo*. Though the order of *status quo* is not discernable from the averments made in the instant revisional application yet, according to the petitioners, the defendant/opposite party is violating the same and a miscellaneous case registered under Order XXXIX Rule 2A of the Code of Civil Procedure

is pending before the court. In the midst of such proceedings, an application under Order XXXIX Rule 7 of the Code of Civil Procedure is filed by the petitioners for appointment of an Advocate Commissioner to inspect the subject property and submit the report before the court indicating the exact extent of affairs and the position thereat. The trial court rejected the said application with the specific finding that on the western side of the building there is a driveway, but in a later portion of the order it is recorded that the sketch map annexed with the deed does not indicate that such driveway, in fact, exists on the western side but shown to have its existence on the eastern side. It led the petitioners to move the instant revisional application before this Court and according to the learned Advocate representing the petitioners such discrepancy is eminent and evident from the record itself.

At the very outset, I must record that the provisions contained under Order XXXIX Rule 7 of the Code of Civil Procedure cannot be used in order to fish out and/or gather evidence for the parties. It is intended solely for the purpose of inspection and the preservation of the property that too when the Court feels that the same is necessary.

My attention is drawn to the written objection filed by the contesting defendant and it is manifest therefrom that he has also taken a firm and categorical stand that the said passage is meant for driveway and, in fact, exists on the western side. However, a counter allegation is made against the petitioners that they, in collusion and in connivance with some other occupants of the said complex, are trying to create an obstruction and/or hurdle in free movement for which several complaints have been lodged with the police station.

It is not in dispute that the parties are at the loggerheads. The allegations and counter allegations are apparent from the conduct in course of the proceedings. The report of the Advocate Commissioner is not sacrosanct nor any judgment should be passed thereupon. It is as good as opinion evidence and required to be proved along with the other materials produced by the respective parties at the trial. The inspection can only be ordered if the parties are at variance and not when it is admitted that the subject property is a driveway.

Furthermore, any observations made by the court while disposing of the interlocutory application are tentative in nature and do not have any persuasive value at the time of deciding the issues involved in the suit. It is beyond cavil that the High Court while dealing with the revisional application can substitute its own finding provided the ultimate conclusion of the trial court is found to be correct.

In view of the findings made herein above, I do not find there is any infirmity and/or illegality in the ultimate decision of the trial court whereby the application was dismissed.

The revisional application sans substance and the same is hereby dismissed.