

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee.

C.O. 304 of 2019

HARUN AL RASHID & ANR.
VS.
HASNAIN ALI & ORS.

For the petitioner: Ms. Priyanka Jana.

For the opposite party: None.

Heard on: 22.12.2021

Judgement on: 24.12.2021

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order no. 18 dated 10th January, 2019 passed by the learned Civil Judge (Senior Division) at Chanchal, District. Maldah in Partition Suit No. 43 of 2018 present revisional application has been preferred. By the said impugned order, the learned Trial Judge was pleased to allow petition under Order XXVI Rule 9 of the Code of Civil Procedure filed by the defendant no. 22.

2. Plaintiffs/petitioners instituted a suit for declaration and partition against the defendants/opposite parties being Partition Suit No. 48 of 2018 before the Court of learned Civil Judge (Senior Division) at Chanchal District, Maldah contending that the suit property being Dag No. 96/193 in Mouja Haranathpur measuring 91 decimal of land originally belonged to Sk. Jelafet Hossain Sarkar who was the recorded owner of the said plot of land and his name had been recorded in the R.S.R.O.R. Said Jelafat Hossain died leaving behind four sons and four daughters. The legal heirs of Jelafat Hossain Sarkar are the plaintiffs and defendant nos. 1-21 in this suit and they have all inherited the suit property according to Muslim Law of Inheritance.

3. Subsequently, two legal heirs of Jelafet Hossain namely Shoharab Ali and Raihan Ali transferred their share in the suit property by a registered deed in favour of the defendant no. 22. The plaintiffs and the defendants are jointly possessing the suit property. The defendant no. 22 is trying to construct a new building over the joint property and also trying to occupy the whole plot of land.

4. The defendant no. 22 is contesting the said suit and contended that the aforesaid two co-sharers namely Shoharab Ali and Raihan Ali got the entire share in the suit property by way of an oral Heba from the other co-sharers and subsequently had transferred entire land measuring 91 decimal in the suit plot in favour of defendant no. 22.

5. Moreover, the defendant no. 22 has acquired good title in the entire suit plot by way of adverse possession. On the basis of a prayer for interim

order of injunction, the learned Trial Court passed an order of Status quo in respect of suit plot no. 96/193 as regard to its nature, character and possession till disposal of the suit. During pendency of the suit the defendant no. 22 filed an application under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, inter alia, praying for appointment of an advocate commissioner for local investigation commission on the basis of points as mentioned in the schedule of said application and plaintiffs/petitioners filed written objection against said application for local investigation filed by defendant no. 22.

6. After contested hearing the learned Trial Judge allowed the prayer for local investigation commission made by the defendant no. 22 and being aggrieved by that order present revisional application has been preferred. On perusal of the petition for local investigation commission which was filed before the learned Trial Court on 22/08/2018, it appears from the schedule of the investigation petition that the defendant no. 22 prayed for local investigation commission on the grounds:-

- 1.** To investigate whether defendant no. 22 Mahindrapur High School situates on suit plot no. 96/193 covering entire 91 Satak of land or not;
- 2.** To investigate whether defendant no. 22 Mahindrapur High School is a two storied Pakka building situated on suit plot no. 96/193 or not;
- 3.** To investigate whether defendant no. 22 Mahindrapur High School is possessing entire 91 Satak of land over the suit plot no. 96/193

adversely openly with the knowledge of plaintiffs and defendant nos. 1 to 21 and also with the knowledge of whole world ousting the plaintiff and defendant no. 1-21 from 27.01.1982 or not;

7. Before going to further details let us reproduce Order XXVI Rule 9 of the Code of Civil Procedure:-

Commissions for Local Investigations

“R.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.”

8. In view of the aforesaid provision it is clear that for the purpose of elucidating any matter in dispute or for ascertaining market value of any property or the amount of any mesne profits or damages or annual net profit the Court may issue local investigation commission. Now, from the pleadings and petitions as submitted by the parties it appears that the real controversy/dispute between the parties is whether all the heirs of Jelafat Hossain had gifted their share in favour of two heirs namely Shoharab Ali and Raihan Ali by way of oral Heba and/or by dint of said oral Heba whether said Shoharab Ali and Raihan Ali have got right, title and interest to transfer entire 91 Satak of land in the suit plot no. 96/193 in favour of defendant no. 22/Mahindrapur High School or not. The other part of controversy between the parties is whether defendant no. 22 have acquired right, title and interest in respect of entire 91 Satak of land in suit

plot no. 96/193 by way of adverse possession. The matter in dispute is not whether the defendant no. 22/Mahindrapur Junior High School has raised its school building covering entire 91 Satak of land or not.

9. Now let us see in order to elucidate that real dispute between the parties, in other words, to determine whether defendant no. 22/School has acquired right, title and interest in the entire suit property either by way of transfer or by way of adverse possession or not, local investigation commission is required to be allowed or not. I have already stated that from the schedule of investigation commission, it appears that the subject matter of the investigation commission as sought for relates to whether defendant no. 22/school has raised Pakka Two Storied construction covering entire 91 Satak or not and whether defendant no. 22/school is possessing entire 91 Satak of land over the suit plot no. 96/193 adversely openly with the knowledge of whole world including plaintiffs and defendant nos.1-21, ousting the plaintiffs and defendant nos. 1 to 21 from the said suit plot, since 27.01.1982.

10. Needless to say that object of Order XXVI Rule 9 of the Code of Civil Procedure is not to assist a party to collect evidence. The main object as laid down in Order XXVI Rule 9 of the Code of Civil Procedure is for elucidating matter in dispute by way of local investigation.

11. Here the matter in dispute is not whether defendant no.22/school has raised their construction covering entire 91 Satak of suit plot no. 96/193 or not. The real controversy herein is whether defendant no. 22 has acquired right, title and interest in respect of entire 91 Satak of land in the suit

property which can very well be substantiated by the parties by evidence at the trial. By no means, the question of acquisition of title by way of transfer or acquisition of title by way of adverse possession can be elucidated through local investigation commission.

12. Here it appears that defendant no. 22 has already submitted their written statement, therefore, the disputed question of fact can be adjudicated upon by the Court after framing the issues and recording the evidence of the parties and for such purpose assistance of investigation commissioner is neither necessary nor justified to prove as to whether defendant no. 22/school has acquired right, title and interest in respect of entire 91 Satak of land in the suit plot no. 96/193 or not.

13. In view of the above the impugned order no. 18 dated 10/01/2019 passed in Partition Suit No. 48 of 2018 by the learned Civil Judge (Senior Division) at Chanchal, District. Maldah, is hereby set aside. C.O. 304 of 2019 is accordingly allowed without any order as to costs.

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

(AJAY KUMAR MUKHERJEE, J.)