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8.3.2021

C.O.335 of 2021

**SUBHAS CHANDRA BASU & ORS. VS.
SWAPAN GHOSH & ANR.**

Mr. Sudip Ghosh
Mr. Pankaj Halder
..for the petitioners
Mr. Nilanjan Bhattacharjee
Mr. Shirshendu Chowdhury
..for the opposite parties

This revisional application has been filed by the plaintiffs aggrieved by an order dated January 30, 2021 passed by the learned Additional District Judge, 3rd Court(In-Charge) Howrah in Misc.Appeal No. 210 of 2018 arising out Title Suit No. 977 of 2018.

The petitioners are aggrieved because the learned Court below rejected the application under Order 39 Rule 7 of the Code of Civil Procedure on the ground that, once the High Court had directed the appeal to be disposed of within a specified time, allowing the application for local inspection would cause unnecessary delay. It is urged that the Hon'ble High Court in its order passed in C.O.3811 of 2019 had observed that if any fencing was required on the area being determined then the plaintiffs or in alternative opposite parties/defendants could do such fencing subject to such submission being made in court.

On the basis of such order, the petitioners filed an application for local inspection for determination of the area along with local features as to the existence of the structures etc. The said application was rejected on the ground that the time limit fixed by the Hon'ble High Court to dispose of the Misc. Appeal could not be adhered to as the inspection would result in unnecessary delay.

The learned Advocate for the defendants/ opposite party submits that the order 39 Rule 7 of the Code of Civil Procedure could not be used as a means for fishing out evidence especially when the plaint was rejected and the plaintiffs have only got the order of stay from the lower appellate Court against such order of rejection but the final determination as to whether the plaint should be rejected or not has not been done by the appropriate Court of law.

In my opinion, the reasons given by the learned lower appellate Court while rejecting the application under Order 39 Rule 7 of the Code of Civil Procedure is not tenable in law. The direction of this Court should be complied with to the extent possible subject to the fact situation of a case. If it is necessary for the Court to come to a decision as to whether the injunction should be granted or not, situation may so arise and the Court might be required to determine the local features of the property in question. Such

determination should be restricted only to the purpose for which the said application has been made, that is in this case, for disposal of the Misc. appeal. The appeal arises out of rejection of a prayer for ad-interim order of injunction on the suit property. It is submitted that the status of the property is required to be determined. That the property is a vacant land and fencing would be required to protect the property. It was urged that the plaintiffs would also allow the defendants to fence the property as well, if the situation so demanded.

In my opinion, the local inspection shall be confined on the point:- “whether the suit property is a vacant land or not”. A rough sketch map should be drawn in order to show the existing local features thereon and attached to the report. This inspection shall be used only for the purpose of disposal of the Misc. Appeal and shall not be used at the trial of the suit. Allowing this inspection to the limited extent will not be construed as a direction of this Court upon the learned Judge to pass an order of injunction and or status quo while disposing the Misc. Appeal.

The leaned lower appellate Court shall proceed in accordance with law and on the basis of the report as also other documents and pleadings of the parties that may be produced at the time of hearing of the Misc. Appeal and pass necessary orders in accordance with

law.

The learned lower appellate Court shall appoint Advocate Commissioner within 10 days from date. The report of the learned Advocate Commissioner shall be prepared upon holding the inspection in presence of both the parties and be filed in Court within 10 days thereafter. The Misc. Appeal shall be disposed of within a month from the date of filing of the report of the learned Advocate Commissioner.

This revisional application is disposed of.

There will be however no order as to costs.

Urgent photostat certified copy of this order be given to the parties on priority basis, if the same is applied for.

(Shampa Sarkar,J.)

