

23rd July,
2021
(AK)
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C.O. 1151 of 2021

**Smt. Mukti Chatterjee and others
Vs.
Sri Chandan Mukherjee**

(Via video conference)

Mr. Debjit Mukherjee
Mr. Nitai Chandra Saha
Mr. Santanu Barik

...For the Petitioners.

Mr. Aniruddha Chatterjee
Mr. Sudip Ghosh Choudhury

...For the Opposite Party.

Learned counsel for the petitioners contends that neither of the two impugned orders, respectively rejecting the petitioners' application under Order XXXIX Rule 7 of the Code of Civil Procedure and allowing the opposite party's application under Order XXVI Rule 9 of the Code, contains any reason and, as such, ought to be set aside.

It is further contended that the application of the defendants/petitioners, seeking an inspection to ascertain whether there was any alternative passage than the Schedule-B property to the petitioners' property, was germane for adjudication of the suit. However, the said application was rejected without any consideration on merits by the first impugned order.

By the second impugned order, it is argued, the court below did not clarify as to why such investigation was necessary.

By placing the points for investigation as allowed by the trial court, learned counsel for the petitioners argues that such points are irrelevant for the adjudication of the suit and are intended to fish out evidence.

Learned counsel appearing for the plaintiffs/opposite parties contends that the order passed under Order XXVI Rule 9 of the Code was sufficiently justified by reason and, in any event, is absolutely necessary for a proper adjudication of the questions which have fallen for determination in the suit.

That apart, it is contended, a local inspection as sought for by the defendants/petitioners, was not wide enough to cover the points involved in the suit and, in effect, would actually amount to a roving enquiry for fishing out evidence.

Upon hearing the contentions of learned counsel for the parties, it is evident that the first impugned order dated December 2, 2019, rejecting the petitioners' application under Order XXIX Rule 7, being utterly devoid of reason, cannot stand judicial scrutiny.

However, the second order of the same date, allowing the application under Order XXVI Rule 9 of the Code, clearly records that, in the present case, the dispute is with respect to the boundary and identity of

the land, and, for proper adjudication of the suit, the prayer should be allowed with certain modifications as effected by the trial court.

Such ratio furnishes sufficient reason justifying the necessity of the local investigation. Moreover, it is apparent from the points on which local investigation was sought by the plaintiffs/opposite parties, that the said questions are germane and necessary for a complete adjudication of the dispute between the parties and, in a sense, would also cover the contention of the petitioners, since, without ascertaining the exact extent of the properties mentioned in Schedules A and B, the fact of existence of the passage and/or any alternative passage or otherwise cannot be discovered.

As such, justice would be sub-served in the event the impugned orders are modified to the effect that the local investigation, as directed by the trial court, apart from the points as mentioned in the application under Order XXVI Rule 9 of the Code of Civil Procedure, shall also include the point as to whether there is any alternative passage for ingress and egress to the petitioners' property apart from the Schedule-B property.

Accordingly, C.O. 1151 of 2021 is disposed of by modifying the impugned orders to the extent that the learned survey-passed Commissioner, entrusted to hold local investigation on the points as mentioned in the plaintiffs' application under Order XXVI Rule 9 of the

Code of Civil Procedure, shall also investigate and ascertain as to whether there is any alternative passage for ingress and egress to the petitioners' property at Schedule-A, apart from the Schedule-B property.

The rest of the said orders are not interfered with.

The parties as well as the court below shall act on the written communication of the learned advocates for the parties, accompanied by a server copy of this order, without insisting upon prior production of a certified copy.

There will be no order as to costs.

Urgent website certified copies of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)