

02 23.11.22

Ct. No. 04

Akd

C.O. 891 of 2021

Sri Jadav Sardar @ Jadab Sardar & Ors.

Vs.

Sri Basudeb Tarafder & Ors.

Mr. Sounak Bhattacharya,

Mr. Debayan Das.

... for the petitioners.

Mr. Sabyasachi Mondal,

Mr. Sayan Mukherjee.

... for the opposite parties.

This matter has been assigned to us by the Hon'ble Chief Justice and on an earlier occasion a point was taken that the revisional application can not be assigned to a Division Bench if it runs counter to the provisions of the Appellate Side Rules of this Court.

Mr. Bhattacharya, learned Advocate, appearing for the plaintiffs/petitioners fairly submits that after looking into the provisions contained in Chapter II of Rule 1 of the Appellate Side Rules he does not find any such fetter and, therefore, his client does not intend to take the said plea and the matter can be decided on merit.

The instant revisional application is directed against an order no. 50 dated 9th March, 2021 passed by the learned Civil Judge (Junior Division), 3rd Court, Baruipur, South-24 Parganas in Title Suit No. 4 of 2016; by which an application under Order XXXIX Rule 7 read with Section 151 of the Code of Civil Procedure was allowed.

The dispute relates to the right, title and interest in respect of the properties described in Schedule B of the plaint, which comprised of 1 and ½ decimal of demarcated and delineated Danga land and Doba. Obviously the present status is Danga Bastu carved out from 18 decimal of land as described in Schedule A thereto. The declaration was sought over the title in

respect of the property described in Schedule B, which is a part of Schedule A property. It is claimed that the said B Schedule property though a part of the A Schedule property, has been demarcated and delineated by virtue of various acts and transactions having made in this regard and, therefore, the plaintiffs/petitioners have acquired an absolute right, title and interest in respect thereof and the claim of the defendants is unsupportable and undefendable.

The defendant no.2, who is the contesting opposite party in the instant revisional application, appears to have contested the said suit by filing written statement. The tenet of the defence manifest from the said pleading indicates that they have denied the exclusivity in respect of the Schedule B property and tried to contend that the absolute right can not be claimed by the plaintiffs/petitioners, more particularly when several proceedings in respect of the suit property are pending in different Courts. It is further contended that this property is not partitioned by metes and bounds and, therefore, even if the possession of one of the co-owners shall be regarded as a possession on behalf of other co-owners, there is no reflection in the written statement about the existence of a hut over the B Schedule property nor in respect of A Schedule property.

In the backdrop of the above, an application was taken out for appointment of Advocate commissioner to inspect the property and submit the report on the points of inspections appended thereto.

The first point pertains to the present condition of the structure situated in the portion of the suit property under the possession and occupation of defendant no. 2. The second point relates to the estimation of damages of the said structure and the

other points appear to be omnibus, consequential and connected to the aforesaid main points.

By the impugned order the Trial Court allowed the said application solely on the ground that if the inspection is done through a commissioner, it will bring out more facts touching upon the aspects and grounds of contentions made by the parties. The Trial Court further held that in absence of such inspection the Court may not be in a position to arrive at the conclusion over the existence of any structure at the suit property.

The Trial Court committed a grave error in allowing local inspection without returning its findings on the nuances of provisions contained under Order XXXIX Rule 7 of the Code. The aforesaid provisions bestow power upon the Court on an application made by any of the parties to the suit to make an order of detention, preservation and inspection of any property being the subject matter of suit or as to which any question may arise therein.

The real issue involved in the instant case is whether the plaintiffs/petitioners have an absolute right, title and interest in respect of B Schedule property or the said B Schedule property being admittedly a part of A Schedule property is still an unpartitioned property of the respective co-owners thereof. Schedule B indicates that there is an existence of two storied structure in respect of the land comprised of 1 and $\frac{1}{2}$ decimal of land, which does not appear to have been denied by the said contesting defendant no. 2 in the written statement.

A point is sought to be taken that the Hut, which was damaged because of the storm, is within the A Schedule property and since the order of injunction in the form of status quo has been passed over the said

Schedule property, it was inevitable to seek permission before any repairing work is undertaken by the said defendant.

The aforesaid contention is beyond the scope of an application filed by the contesting defendant before the Trial Court. There is no reflection of such facts in the said application, but the said application runs into several paragraphs which can succinctly be said to have hovered around the necessity of inspection on the damage of the Hut because of the storm. The Court cannot appoint the commissioner merely on the ipsi dixit of the statements made by the parties to the said suit.

The language employed under Order XXXIX Rule 7 of the Code conveys a laudable message that the Court on an application made by any of the parties to the suit can direct inspection of the property provided such property is the subject matter of disputes or any question may arise in respect of such property.

The subject matter of dispute in the instant suit is the property described in Schedule B thereto and there is no dispute in respect of A Schedule property. The plaintiffs do not claim absolute right, title and interest in respect of A Schedule property in its entirety but founded its claim in respect of a portion of A Schedule property described in Schedule B thereto and, therefore, there is no confusion in this regard that the subject property is the property covered under Schedule B thereto.

The above observations can be further corroborated from the reliefs claimed in the plaint in the form of declaration. The reliefs would not reveal that there is any claim made in respect of Schedule A property but was restricted to B Schedule property and, therefore, the subject matter of dispute would be

within the scope of B Schedule property.

The contention of the said contesting defendant that the said Hut is situated outside the B Schedule but within the A Schedule property cannot be accepted in absence of the pleading. The importance of pleadings in civil disputes cannot be ignored and/or overlooked. The pleadings being the foundation, evidence are to be adduced on the basis thereof, as the parties cannot be permitted to adduce evidence, which is beyond the pleadings. Therefore, the significance of pleadings in a civil adjudicatory system has to be understood in that perspective and the law does not permit to bring out the fact *de hors* the pleadings at the Bar more particularly on the wisdom of the learned Advocates appearing for the parties.

The facts, which are neither pleaded nor appear to have impliedly taken in the pleading, cannot be permitted to be taken at the Bar, as no new case shall be permitted to be made out which has not been taken by the parties to the said suit.

In view of the legislative intent manifest from the provisions contained under Order XXXIX Rule 7 of the Code, the Court should not allow the applications directing inspection without considering the respective pleadings of the parties and the points that may arise therein. It is beyond cavil of doubt that the provisions contained under Order XXXIX Rule 7 of the Code can never be intended to gather evidence for the party or to fish out evidence but has to be understood and activated within the spirit of the legislative intent.

By the impugned order it appears that the Trial Court without looking into the pleadings as well as the statements made in the said application proceeded to allow the said application in a more cursory manner

or in a slipshod manner and, therefore, the order bereft of proper reasons cannot be supported nor can be allowed to stand.

In view of the above, the order impugned is set aside. The application filed by the contesting defendant under Order XXXIX Rule 7 & 8 and Section 151 of the Code of Civil Procedure is hereby rejected.

The civil revision application is thus disposed of.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)