

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

CO. No. 2554 of 2022

**Sri Thakur Dayal Seth
Vs.
Sri Debabrata Porel Ors.**

For the Petitioner	: Mr. Buddhadeb Ghosal, Adv. Mr. Souri Ghosal, Adv.
For the Opposite Parties	: Mr. Probal Mukherjee, Sr. Adv. Ms. Shebatee Datta, Adv. Ms. Babita Dey, Adv.
Heard On	: 16.11.2022.
Judgment	: 21.11.2022.

Subhasis Dasgupta, J:-

The subject matter of challenge in this case is against the rejection of a prayer for local inspection under Order 39 Rule 7 of the Code of Civil Procedure.

According to Mr. Buddhadeb Ghosal, learned advocate representing the petitioner/plaintiff, an attempt was undertaken by defendants intending to interfere with the easy movement of the plaintiff in repairing the out side wall of the building, by putting a padlock in the entrance gate

in respect of the 'C' schedule property, which is commonly enjoyed by both the parties to this case. Reference was drawn by Mr. Ghosal to paragraph 12 of copy of plaint to that effect.

Mr. Ghosal further submitted that there had been an ad interim order of injunction granted, restraining the defendants from obstructing the plaintiffs' repairing work in the 'A' schedule property by availing the 'C' schedule strip of land.

Since real state of affairs, existing with respect to the 'C' schedule land intervening 'A' and 'B' schedule property, there arose the necessity to propose for local inspection under Order 39 Rule 7 of the Code of Civil Procedure, which the court below without truly adverting the purport of the facts disclosed in the petition, together with the schedule of the points, sought to be inspected, had most illegally rejected, upon improperly exercising the authority vested to court below, Mr. Ghosal argued.

It was thus proposed by Mr. Ghosal that unless such local inspection was allowed to be held, there may not be fair adjudication of the prayer for injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure.

Incidentally, it was submitted by Mr. Ghosal that when the court below was satisfied with the prima facie case, presented at the time of granting ad interim order of injunction, together with the urgency of the circumstances, the prayer for local inspection ought not to have been

rejected, merely on an imaginary ground that it would fish out evidence ultimately.

Attention of the court was drawn further by Mr. Ghosal to the written statement, submitted by the defendants containing a counter claim, wherein defendants themselves had proposed for holding local inspection of the subject property to bring the actual topography before the court. It was thus proposed by the Mr. Ghosal that when defendants themselves proposed for local inspection, there would not be any prejudice caused to defendants, merely upon holding the local inspection on the prayer of the plaintiff/petitioner.

Per contra, Mr. Probal Mukherjee, learned senior advocate, representing opposite parties/defendants disputing with the submission of Mr. Ghosal, replied that the strip of land running north to south, as per agreement executed between the parties, would be utilised by both the parties for temporary staging scaffolding etc., for plastering, repairing and maintenance of respective peripheral walls of both the parties, and such strip of land, as depicted in schedule 'C', intervening 'A' and 'B' schedule property in any case, could not be construed to be a common passage, upon narrowly interpreting the agreement, executed on 17th November, 2000.

Mr. Mukherjee, putting much emphasis upon such agreement, dated 17th November, 2000 submitted that strip of land, marked as 'C' schedule in any case, could not be construed to be a common passage.

Thus, the existence of 'C' scheduled land measuring about 2 feet wide strip of land was not disputed by the Mr. Mukherjee. The 'C' schedule property is strip of land intervening 'A' and 'B' schedule property, as disclosed in the plaint.

It was was argued by Mr. Mukherjee that when existence of 2 feet wide strip of land, depicted in 'C' schedule was not at all disputed by the defendants, there left no necessity for holding local inspection. More so, the contradictory prayers made in the plaint, would not, however, justify holding of local inspection of the subject property in any manner whatsoever.

Supporting the order of the court below, Mr. Mukherjee submitted that 'C' schedule land could not be allowed to be claimed, as a common passage, and to fish out evidence, there could not be any local inspection held for the purpose, merely on the claim of plaintiff/petitioner.

Having considered the submission of both sides, it appears that prayer for local inspection containing a schedule of points, sought to be inspected, was filed before the final hearing of an application for temporary injunction under Order 39 Rules 1 and 2.

Allegation has been there, that defendants attempted to interfere with the repairing work, said to be undertaken by the petitioner, upon use of 'C' schedule land, left vacant in terms of the agreement executed between the parties on 17th November, 2000, intervening 'A' and 'B' schedule property.

It is the admission of opposite parties/defendants that said strip of 2 feet wide land was left vacant, merely for the purposes disclosed specifically in such agreement, which may be set out hereinbelow as disclosed in Para - 9 of the plaint.

“The said strip of land running north to south shall remain as it is and will be utilized by both the parties for temporary staging scaffolding etc for plastering, repairing, and maintenance of respective peripheral walls of both the parties.”

What is specifically denied by the opposite parties is against the alleged claim of user of such strip of land as a common passage. It is according to opposite parties, the said strip of land may be used for the purposes mentioned in the agreement, but it cannot be claimed to be a common passage.

The main issue sought to be adjudicated in the pending litigation in gist is whether such ‘C’ schedule land may be declared as common passage or not, as per prayer depicted in the plaint.

The proposed prayer for local inspection is, just to facilitate appropriate decision, to be returned in connection with a final hearing of an application for temporary injunction. While deciding finally an application for temporary injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure, the prayer contained in the plaint may be

incidentally looked into, but that is not a paramount consideration, otherwise there may be chance of pre-judging the suit. Without any controversy, the injunction application has to be disposed of in terms of certain principles of law.

When existence of 2 feet wide strip of land, marked as 'C' schedule, left vacant, as per agreement between the parties, intervening 'A' and 'B' schedule property is not disputed by the defendants/opposite parties, the local inspection if allowed to be held with respect to points mentioned in the schedule, save and except points mentioned in Sl. No. 2 and 3 of such schedule, that would not cause any prejudice to defendants/opposite parties. Because of admission disclosed by Mr. Mukherjee, there lies no necessity of any measurement, as proposed by petitioner.

For the reasons discussed hereinabove, the revisional application stands disposed of, upon setting aside the impugned order with a direction upon the court below to appoint learned Inspection Commissioner subject to the deposition of Commissioner's fees, as would be decided by the court below, which would deem fit and proper, within 5 (five) days from the of communication of this order to the learned court below.

Subject to the deposition of such cost of inspection by the petitioner, the appointed Local Inspection Commissioner would conclude local inspection with respect to points disclosed in schedule 1 of local

inspection in Sl. No. 1, 4 and 5 only upon advance notice to other sides and their learned advocates in court below.

It is further clarified that point disclosed in Sl. No. 2 and 3 of such schedule of local inspection may not be allowed to be inspected by the local Inspection Commissioner.

The local Inspection Commissioner may be directed to submit his report within fortnight from the date of deposition of cost, by the petitioner, in the court below.

The report of learned Inspection Commissioner may be accepted in accordance with law.

The hearing of injunction application may be kept deferred till the submission of learned Inspection Commissioner's report.

It is further clarified that hearing of injunction application will, however, be concluded before the end of December, 2022, without granting unnecessary adjournment, unless it is extremely unavoidable.

The court below would, however, be free to take independent decision in connection with the prayer for temporary injunction in accordance with materials to be produced by either of the parties to this case.

Nothing would, however, prevent the petitioner from adducing evidence during trial, both oral and documentary to establish the prayers contained in plaint, irrespective of instant local inspection commissioner's

report, nor opposite parties/defendants to seek for local inspection afresh, if any, in context with proposed counter claim.

With this direction and observation the revisional application stands disposed of.

Both the parties are directed to make communication of this order to the learned court below.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis.

(Subhasis Dasgupta, J.)