

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.748 of 2018**

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Asraf Ansari, Son of Late Kamrujama Ansari, Resident of Village- Nuaon,
P.S.- Nuaon, District- Kaimur (Bhabua).

... .. Petitioner/s

Versus

Jitendra Prasad, Son of Ram Charan Sah, Resident of Village- Nuaon, P.S.-
Nuaon, District- Kaimur (Bhabua).

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Om Prakash Upadhyay, Advocate
For the Respondent/s : Mr. Dhaneshwar Prasad, Advocate
Mr. Satyendra Pandey, Advocate

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**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT**

Date : 17-07-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous Application has been filed for setting aside the order dated 17.01.2018 passed in Title Suit No. 435 of 2009 by the learned Court of Sub-Judge 1st, Kaimur at Bhabua whereby and whereunder the learned Court below has rejected the petition dated 07.08.2014 filed by the petitioner for appointment of Pleader Commissioner.

3. Brief facts of the case are that the respondent being plaintiff filed the suit being T.S. No. 435 of 2009 for declaration of title and possession over the suit land. Petitioner is one of the substituted legal heirs of original defendant who filed the petition dated 07.08.2014 for appointment of Pleader Commissioner to inspect the suit land and to submit a report including whether there



is pakka room, hand pump, tree and a shop on the suit land or not. It was stated in the petition that PW-2 in his cross-examination in para 7 denied the said fact. It is essential to bring the correct fact on record. The said petition was rejected observing that Pleader Commissioner cannot be appointed for controverting the statement made by the witness nor the same can be done for collecting the evidence.

4. Learned counsel for the petitioner submits that the petitioner had not filed the application for appointment for Pleader Commissioner keeping in view of the cross-examination of PW- 2 rather the same was referred in order to show the necessity for appointment of Pleader Commissioner on the ground mentioned in the petition. The said petition was neither belated nor it was filed to waste the time of the Court and the finding arrived by the learned trial Court is fit to be set aside.

5. Learned counsel for the petitioner relied upon a judgment of this Court in **Ram Shekhar Singh Vs. State Bank of India & Ors.** reported in **2005 (2) PLJR 524**, wherein the Court has observed that to avoid vagueness and to come to a definite conclusion about the actual physical position of suit premises, it is necessary that a Pleader Commissioner should have been



appointed by the learned Court below to report about the exact position of the suit premises.

6. Learned counsel for the respondent submits that the suit land is in possession of the plaintiff but wrongly the name of respondent mentioned in survey khatian accordingly, the suit has been filed for declaration of title and possession which is denied by the respondent and both the parties are claiming title and possession which is required to be adjudicated on the basis of oral and documentary evidence produced by the parties.

7. Learned counsel for the respondent further submits that the petitioner had filed the said application after examination of three witnesses on behalf of the plaintiff-respondent. The law is well settled that the local Commissioner cannot be appointed for collecting the evidence on record and also to contradict the statement of witnesses. The parties have to prove their case by documentary as well as oral evidence.

8. From perusal of the impugned order, it appears that the learned Court below observed that the said application for appointment of Pleader Commissioner was filed on the basis of the statement made by P.W. 2 Naresh Kumar Agrawal, in his cross-examination in paragraph-7, who is not the plaintiff. The Pleader Commissioner cannot be appointed for verifying the truthfulness



of the statement of the witnesses. The Court found that the petition of the petitioner has no force and accordingly, rejected the same.

9. It is clear from reading of Order 26 Rule 9 of the Code that:-

(i) Primarily it is the discretion of the trial Court to issue a Commission for local investigation and,

(ii) Such Commission can be appointed at any stage for the purpose of ascertaining the facts enumerated in the provision for elucidating any matter in dispute.

(iii) It does not provide the stage when a Commission can be issued.

10. In **Padam Sen and Another Vs. The State of U.P.** reported in **AIR 1961 SC 218**, the three Judge Bench of the Hon'ble Supreme Court has held that it is not the business of the Court to collect evidence in favour of one party. In a matter related to investigation into the disputed question of fact of possession, the power of appointment of Commission for local investigation cannot be exercised by the Court to assist the party to collect the evidence, where the party can collect the evidence himself.

11. During pendency of trial and before the judgment if the trial Court finds that any issue requires clarification or



elucidation, the Court may *suo motu* appoint Commissioner to submit report for which no application is required. The scope of Order 26 Rule 9 of CPC is very limited.

12. The report of Commissioner is not binding on the trial Court and it can be used for the purpose of appreciating the evidence on record. In case of controversy with respect to demarcation on the land and dispute of encroachment, the Court generally appoint Commissioner if required in particular facts of the case. The issue of possession is to decided only on the basis of evidence.

13. In view of the aforesaid facts and circumstances and the law discussed above, this Court does not find any jurisdictional error or illegality in the impugned order passed by the learned Court below.

14. Accordingly, this Civil Miscellaneous Application is dismissed with no order as to costs.

(Sunil Dutta Mishra, J)

Anand Kr.

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Transmission Date	

