

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1374 of 2018

Ram Sanjiwan Choudhary, S/o-Late Ram Charitra Chaudhary, Resident of
Mohalla - Kashipur, Ward No.-13, P.O./P.S./District - Samastipur.

... .. Petitioner

Versus

1. Arun Kumar Rai
2. Sashi Kumar Rai
3. Binay Kumar Rai.
All sons of late Chandradeep Rai, Resident of Mohalla - Kashipur,
Ward No.-13, P.O./P.S./District-Samastipur.
4. Bishakha Devi, W/o- Satyanarayan Thakur, resident of Mohalla - Kashipur,
Ward No.-13, P.O./P.S./District - Samastipur.

... .. Respondents

Appearance :

For the Petitioner	:	Mr. Abhay Shankar Singh, Advocate Mr. Barun Kumar Singh, Advocate Mr. P. Pankaj Raj Anand, Advocate
For the Respondents	:	Mr. Mukesh Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT

Date : 04-09-2023

In this case, the petitioner is challenging the order dated 27.07.2018 passed by learned Sub Judge, I, Samastipur in Title Suit No.344 of 2015, by which the prayer of the petitioner for appointment of Survey Knowing Pleader Commissioner has been rejected.

2. The facts of this case, as stated in the writ petition, are that the land bearing Khata No.48, Khesra No.818 belonging to Anil Kumar Mukherjee, Kanhaiya Lal Mukherjee and Mritunjay Kumar Mukherjee, sons of late Nani Gopal



Mukherjee, was purchased by the petitioner-original plaintiff and the respondents-original defendants in the year 1979. The petitioner-original plaintiff and the respondent nos. 1, 2 and 3-original defendant 1st party and the respondent no.4-original defendant 2nd party, entered into a contract and accordingly, joint land of all three persons was divided in six plots. From north to south, there is a road measuring 10 feet and 8 inches for the use of all three persons. From southern side, two plots were made for business purposes one to each set of defendants. The defendant 1st party got their share of land in the middle of the road and Bishakha Devi, original defendant 2nd party, got her share of land from southern side of the plot. Accordingly, all three persons constructed their respective houses as per the agreement between them and are residing in their respective houses.

3. It is the case of the petitioner that in the revisional survey, the road measuring 10 feet and 8 inches has been defined as separate plot. Thereafter, the defendants used to create hindrance in using the road allotted to the petitioner-original plaintiff, which compelled him to file a suit viz. Title Suit No.344 of 2015. In the title suit, the defendants appeared and filed their joint written statement and challenged the



maintainability of the suit on many grounds including the grounds that the plaintiff had intentionally not mentioned the details of the land in question and the entry in the Revisional Survey had been made in collusion with the Government officials.

4. It is also the case of the petitioner that since there were contrary statements regarding the suit land, the plaintiff-petitioner filed a petition dated 16.04.2018 under Order 26 Rule 9 of the Code of Civil Procedure (for short “C.P.C.”) for appointment of Survey Knowing Pleader Commissioner for scientific measurement and for reporting the actual physical features of the land in question. However, by the impugned order dated 27.07.2018 the prayer of the petitioner for appointment of Survey Knowing Pleader Commissioner has been rejected. Hence, this application.

5. Learned counsel for the petitioner submits that the parties have constructed their houses as per their agreement and now the respondent-original defendants are not allowing the petitioner-original plaintiff to use the common road and are also disputing the details of the land furnished by the petitioner, in such a situation, the Court below ought to have appointed the Survey Knowing Pleader Commissioner.



6. Learned counsel for the petitioner further submits that Order 26 Rule 9 of the CPC deals with the appointment of the Survey Knowing Pleader Commissioner and in the present case for deciding the dispute, it is necessary that the Court below should be directed for appointment of Survey Knowing Pleader Commissioner.

7. In support of his submissions, learned counsel for the petitioner has relied upon the following judgments:-

- (i) ***Sita Ram Thakur vs. Nandu Jha & Others*** reported in ***1986 PLJR 527***.
- (ii) ***Bijendra Mishra & Others vs. Jagdish Mishra & Others*** reported in ***1989 PLJR 584***.
- (iii) ***Ram Shekhar Singh vs. State Bank of India & Ors.*** reported in ***2005(2) PLJR 524***.
- (iv) ***Haryana Waqf Board vs. Shanti Sarup & Ors.*** reported in ***(2008) 8 SCC 671***.

8. Learned counsel for the respondents has supported the impugned order and has submitted that the application filed by the petitioner for appointment of Survey Knowing Pleader Commissioner under Order 26 Rule-9 of the



C.P.C. is malafide and the same has been filed for collecting evidence. He further submits that the suit is not for removal of encroachment and therefore, the appointment of Survey Knowing Pleader Commissioner is not necessary in the present case and the Court below has rightly rejected the application of the petitioner.

9. In support of his submissions, learned counsel for the respondents has relied upon a decision of the Hon'ble Supreme Court rendered in the case of *Padam Sen & Another vs. The State of U.P.* reported in *AIR 1961 SC 218*; judgment and order dated 17.07.2023 passed by a coordinate Bench of this Court in *Civil Miscellaneous No.748 of 2018 (Ashraf Ansari vs. Jitendra Prasad)*. He has also relied upon an order dated 08.07.2019 passed by the Madhya Pradesh High Court in *M.P. No.2406 of 2019 (Smt. Teena Pandey & Anr. vs. Dr. Kirnesh Pandey)*.

10. I have considered the rival submissions of the parties.

11. For deciding this case, it will be relevant to quote Order 26 Rule 9 of the CPC, which reads as under:-

“Order 26, Rule 9: Commissions to make local investigations:--

"In any suit in which the Court deems a



local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

12. This Court in the case of ***Sita Ram Thakur vs. Nandu Jha & Ors (supra)*** has allowed the appointment of the Survey Knowing Pleader Commissioner in a suit for declaration of title and recovery of possession.

13. In the case of ***Ram Shekhar Singh vs. State Bank of India & Ors. (supra)*** this Court has allowed the application for appointment of Survey Knowing Pleader Commissioner by holding that the plaintiff might not be aware of the full configuration of the suit premises and to avoid the vagueness and to come to a definite conclusion about the actual physical position of the 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 especially in view of the claim raised by the intervenor defendant.

14. The Hon'ble Supreme Court in the case of ***Haryana Waqf Board vs. Shanti Sarup & Ors. (supra)*** has held in paragraph nos.4 and 5 as under:-

- “4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9, CPC.
5. The appellate Court found that the trial Court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegation of unauthorized possession in respect of the suit land by them as per Para 3 of the Plaint. But the only controversy between the parties was regarding demarcation of the suit land because the land of the respondents was



adjacent to the suit land and the application for demarcation filed before the trial Court was wrongly rejected.”

15. In the case of ***Padam Sen and Another vs. The State of U.P. (supra)***, it has been held by the Hon’ble Supreme Court 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.

16. In the case of ***Smt. Teena Pandey & Anr. Vs. Dr. Kirnesh Pandey (supra)***, the Madhya Pradesh High Court after considering the judgment of ***Haryana Waqf Board vs. Shanti Sarup & Ors. (supra)*** has held that the commission can be appointed only in case of demarcation and encroachment. The issue of possession is to be decided only on the basis of the evidence.

17. From the aforesaid decisions, it is clear that the appointment of Survey Knowing Pleader Commissioner under Order 26 Rule 9 can be ordered when it is found that local investigation may be required or proper for the purpose of



elucidating any matter in dispute, ascertaining the market value of the property. The Survey Knowing Pleader Commissioner appointed under the Code has to make survey/investigation of the disputed plot and submit a report to the Court and he is not doing a judicial act but is doing a ministerial act and his report can be objected by either of the parties. The report of the Survey Knowing Pleader Commissioner can be relied upon by the Court or may be rejected by the Court. The report of the Survey Knowing Pleader Commissioner is only an opinion not a finding, which may come to the aid of the Court in deciding the dispute and the actual state of affairs.

18. In the present case, the dispute between the parties is with regard to a road in the plot which was bought by the parties together, in which shops and houses have been constructed by the parties and the respondents-original defendants are creating hindrance in using the said road in the plot allotted, which was for the common use of the parties. Hence, considering these facts, in my opinion, the appointment of Survey Knowing Pleader Commissioner is necessary to decide the dispute between the parties.

19. In view of the aforesaid discussions, the impugned order dated 27.07.2018 passed by the Sub Judge, I,



Samastipur in Title Suit No. 344 of 2015 is quashed. The petition dated 16.04.2018 filed by the petitioner under Order 26 Rule 9 of the CPC in the Court below is hereby allowed. The Court below is directed to appoint a Survey Knowing Pleader Commissioner within fifteen days from the date of receipt/production of a copy of this order.

20. The Survey Knowing Pleader Commissioner must file his report within two months from the date of his appointment. Thereafter, the Court below will proceed with the title suit and decide the same within one year of submission of the report by the Survey Knowing Pleader Commissioner.

21. With the aforesaid observations and directions, this application stands allowed.

(Sandeep Kumar, J)

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AFR/NAFR	A.F.R.
CAV DATE	N/A.
Uploading Date	09.10.2023
Transmission Date	

