

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1785 of 2018

1. Devanti Devi Wife of Gauri Shankar Prasad Resident of Village-Brahmpur Chaurasta, Police Station Brahmpur Chaurasta, District Buxar.
2. Gauri Shankar Prasad Son of Late Panchratan Prasad Resident of Village-Brahmpur Chaurasta, Police Station Brahmpur Chaurasta, District Buxar.

... .. Petitioner/s

Versus

Surendra Mohan Singh Son of Late Radha Mohan Singh Resident of Village-Brahmpur, Police Station Brahmpur, District Buxar.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Rang Nath Choubey, Advocate
For the Respondent/s	:	None

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT

Date : 19-04-2023

Notice was served upon respondent. Despite sufficient opportunities granted to respondent, no one appeared on his behalf.

2. Heard learned counsel for the petitioners.

3. Plaintiffs/petitioners have filed this Civil Miscellaneous application under Article 227 of the Constitution of India against the order dated 31.07.2018 passed by learned Sub-Judge-II, Dumraon in Title Suit No. 50 of 2017 whereby and whereunder a petition dated 15.05.2018 filed by the petitioners under Order 26 Rule 10-A of the Code of Civil



Procedure (hereinafter to be referred as CPC) for appointment of Survey knowing Advocate Commissioner for taking of measurement of encroached land has been dismissed.

4. The short facts of the case are that the plaintiffs/petitioners filed Title Suit No. 50/2017 for declaration of title of plaintiffs on the suit land on the basis of registered sale deed No. 1820 dated 05.03.2010 and defendant has no right on the same and also to confirm the possession of plaintiffs on the suit land and also for recovery of possession after removal of tin shed kept by defendant on the south-west corner of the suit land. The defendant / respondent is son of ex-landlord who has no right or title upon the suit land after execution of sale deed by his father but has encroached the said portion of suit land.

5. During the proceeding of the suit the petitioners filed the said petition under Order 26 Rule 10A CPC on 15.05.2018 for appointment of Survey Knowing Advocate Commissioner to take measurement of encroachment on suit land. The said petition has been rejected by the learned trial Court vide the impugned order dated 31.07.2018.

6. Learned counsel for the petitioners has submitted that the learned Court below has failed to exercise his



jurisdiction and rejected the petition without assigning cogent reason. He has submitted that by appointing the Survey Knowing Advocate Commissioner no any loss or injury would cause to the respondent and the same will help to come at right conclusion in the controversy involved in the suit. Accordingly, he prayed to set aside the impugned order.

7. Having heard learned counsel for the petitioners and on perusal of the impugned order it appears that the learned Court below considering the facts and circumstances of the case observed that the onus is on the plaintiffs to prove their case and the facts of encroachment through their evidence and confirmation of encroachment by Survey Knowing Advocate Commissioner will come under the purview of collection of evidence by the Court which is against the procedure established by law. If the plaintiffs will able to prove their case and alleged encroachment by their evidence then the Court at the time of judgment may order for removal of encroachment and if required in Execution case, the Survey Knowing Advocate Commissioner may be appointed as per the procedure.

8. The question of appointment of commission does not depend upon merely whether any prejudice will be caused or not. Instead, there should be sufficient basis and justification as



also an effective need.

9. Under Order 26 Rule 10A of the CPC, the Court has to decide as to whether the scientific investigation is necessary for the purpose of deciding the case. Only if the Court considers it necessary or expedient in the interest of justice to do so, it would issue a commission to such person as it think fit, directing him to inquire into such question and report thereon to the Court.

10. In **Padam Sen and another Vs. The State of UP (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.

11. There is no dispute as regard to identity of the suit land. The plaintiffs/petitioners want to collect evidence as regard the alleged encroachment on suit land. The learned Court below has given finding that in this case at this stage there is no need of appointment of Survey Knowing Advocate Commissioner and accordingly rejected the petition.

12. Since the impugned order is neither without any jurisdiction nor it suffers from any error, no ground for interference is made out for interference by this Court under Article 227 of the Constitution of India.



13. In view of the aforesaid discussion, I do not find any merit in this application. The Miscellaneous Application is devoid of merit and is accordingly dismissed.

(Sunil Dutta Mishra, J)

saaurabhkr/-

AFR/NAFR	NAFR
CAV DATE	09.02.2023
Uploading Date	19.04.2023
Transmission Date	

