

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.856 of 2022

1. Kalawati Pathak W/o Sri Paras Nath Pathak, R/o Hasua Thana, presently residing at Malvia Nagar, P.S.- Mahadev, District- Siwan.
2. Sanjay Pathak S/o Mirtunjai Pathak, R/o Sewatapur, P.S.- Merwa, at present residing at Malvia Nagar, P.S.- Mahadav, District- Siwan.

... .. Petitioner/s

Versus

Srimati Birij Kumari Devi W/o Paras Nath Shahi, Resident of Village- Parhari, P.S.- Siwan, at present residing at Malvia Nagar Mahadeva, P.S.- Siwan Muffsil, District- Siwan.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Gyanendra Kumar Shukla
For the Respondent/s : Mr.Anjani Parashar

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL ORDER

2 05-09-2023 Heard the parties.

2. By the impugned order dated 20.09.2022 passed by learned Munsif, Siwan in connection with Title Suit No. 68 of 2002 by which the application of the petitioners for appointment of survey knowing pleader commissioner has been rejected.

3. The suit is for removal of encroachment and the application under Order 26 Rule 10 (A) was filed by the plaintiff in the Court below and the same has been rejected by saying that the survey knowing advocate commissioner cannot be appointed for collecting the evidence.

4. Learned counsel for the petitioner has taken this Court to the provisions of Order 26 Rule 10 (A) and has submitted that to decide the encroachment, the report of the survey knowing advocate commissioner is must.

5. Learned counsel for the petitioner has also relied



upon the judgment of this Court in the case of Satdeo Tiwari Vs. Parasnath Singh 2023 01 PLJR Page 271.

6. Learned counsel for the defendant has submitted that the impugned order cannot be interfered and he has relied upon the judgment of Hon'ble Supreme Court in the Case of ***Padam Sen and Others Vs. State of Uttar Pradesh AIR 1961 SC 218.***

7. I have considered the submission of the parties.

8. Order 26 Rule 10 (A) of the C.P.C. reads as follows:-

*“10A. Commission for scientific investigation:- (1)Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.
(2) The provision of Rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9”*

9. The Judgment in the case of ***Padam Sen and Others Vs. State of Uttar Pradesh (supra)***, in my opinion is not applicable to the facts of the case.

10. Considering the aforesaid facts, this application is allowed.



11. The impugned order dated 20.09.2022 passed by learned Munsif, Siwan in connection with Title Suit No. 68 of 2002 is hereby set aside and the application dated 07.04.2022 for appointment of survey knowing pleader commissioner is allowed.

12. The Court below will appoint a survey knowing pleader commissioner within a month from the date of receipt/communication of a copy of this order and the survey knowing pleader commissioner will give his report within two months of the receipt of the writ for the same and thereafter, the suit shall be decided within a year after the submission of the report of the survey knowing pleader commissioner as the same is of the year 2002.

13. The parties are directed to cooperate in the expeditious disposal of the Suit and if any of the parties will not cooperate in the disposal of the Suit then the learned Judge hearing the Suit will be at liberty to proceed in the matter against the non-cooperating party.

(Sandeep Kumar, J)

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