

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 162 of 2022

Smt. Krishna Sharma

VERSUS

Smt. Maya Mukherjee & Ors.

For the petitioner:

Mr. Animesh Paul, Adv.

For the opposite party Nos. 1 and 2:

Mr. Souri Ghosal, Adv.

Mr. Probhat Kr. Singh, Adv.

Judgment on: May 12, 2023

Biswaroop Chowdhury,J:

The petitioner before this Court is a plaintiff in a suit for declaration and permanent injunction and is aggrieved by order dated 15-12-2021 passed by the Learned Civil Judge (Junior Division) 5th Court at Howrah in Title Suit No. 689 of 2020 of not allowing part of the prayer made in an application under Order 39 Rule 7 and 8 read with Section 151 of the Code of Civil Procedure.

The petitioner being aggrieved by the Order passed by the Learned Court below has come up with the instant application.

The case of the petitioner/plaintiff may be summed up thus:

1. The petitioner has filed a suit for declaration and permanent injunction being Title Suit No. 689 of 2020 against the opposite parties in the Court of the Learned Civil Judge (Junior Division) 5th Court at Howrah praying for following reliefs:
 - a) A decree for declaration that the plaintiff is the owner of the 'A' schedule suit property along with right of common Methor passage and common passage, described in the schedule 'C' Suit property.
 - b) A decree for further declaration that the defendant no. 1,2 and 2(A) to 2(D) have no right to make construction encroaching upon 'C' schedule property and without leaving mandatory side space on four sides in the 'B' schedule property.
 - c) A decree for permanent injunction restraining the defendant no 1, 2 and 2(A) to (D) from making

construction encroaching upon 'C' schedule property and without leaving side space on all the four sides of the 'B' schedule suit property.

- d) An order for interim injunction in the form of prayer © above.
 - e) Leave under Order 2 Rule 2 of Civil Procedure Code 1908.
 - f) A decree for all costs of the suit.
 - g) A decree for any other relief or reliefs to which the plaintiff is entitled both in law and in equity.
2. The petitioner along with the suit has filed an application under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure 1908. The Learned Trial Court upon considering the said application was pleased to pass an ad-interim order of injunction only to the extent of restraining the opposite party Nos. 1, 2, 2(A) to (D) their men and agents from making any construction over the 'C' Schedule common methor passage without due process of law until 05-10-2020.

3. The petitioner being aggrieved by the Order dated 5-09-2020 passed by the Learned Trial Court in not granting an ad-interim order of injunction in respect of the 'B' schedule property, filed an appeal being Misc Appeal No-53 of 2020 in the Court of Learned District Judge at Howrah.
4. By a judgment dated 09.04.2021 the Learned District Judge Howrah was pleased to allow the said appeal on contest thereby setting aside the Order dated 05.09.2020 passed by the Learned Trial Court below and further passing an order of injunction directing both the parties to the suit to maintain status-quo in respect of nature, character and possession of the suit properties ("B" and "C" schedule) and not to change the nature and character of the said properties till disposal of the application under Order 39 Rule 1 and 2 of the Code of Civil Procedure.
5. The opposite party No. 1, 2 and 2A to 2D entered appearance in the said suit and filed written statement coupled with counter claim, written objection to the application of injunction filed by the petitioner herein and

an application for injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure.

6. By the counter claim the opposite party Nos. 1, 2 and 2(A) to 2(D) herein have prayed for following reliefs:

- a) A decree for permanent injunction against the plaintiff restraining her as well as her men and agents from creating any obstruction to the counter/claimant/defendant no-1 in the matter of making construction over the schedule below property in accordance with the sanctioned plan.
- b) A further decree for injunction against the plaintiff from misusing the Order dated 5.09.2020 passed by the Learned Court in suit, which is in connection to the 'C' schedule property to the suit/plaint.
- c) Any other relief/reliefs which the counter claimant is entitled in Law and equity.

7. The application for injunction filed by the petitioner and also by opposite party No, 1, 2 and 2(A) to 2(D) are pending for disposal.

8. The petitioner in the trial Court filed an application under Order 39, Rule 7 and 8 read with Section 151 of the Code of Civil Procedure 1908 in the said suit inter-alia praying for appointment of the Learned Advocate Commissioner to hold the local inspection as per the schedule maintaining proposal points in the said application. By the said application, the petitioner contended that the opposite party Nos. 1,2 and 2(A) to (D) in spite of being well aware of the order of ad-interim injunction passed by the Learned District Judge at Howrah in aforesaid Misc. Appeal No-53 of 2020 are making illegal and unauthorized construction over the suit property in collusion with the men and agents of the Howrah Municipal Corporation and in spite of continuous complaints the authorities of the Corporation are not taking any steps against the said construction and with a prayer for appointment of an Advocate Commissioner for preservation detention and inspection of the suit property and also for bringing clear picture and actual topography of the suit property for proper and effective adjudication of issues involved in the suit.

9. The application filed by the petitioner under Order 39 Rule 7 and 8 read with Section 151 of the Code of Civil Procedure 1908, was heard by the Learned Trial Court, and by an Order dated 15-12-2021 the Learned Trial Court was pleased to allow the said application by appointing a Learned Advocate as Commissioner for holding local inspection of the suit property in terms of the points mentioned in the schedule of the application filed by the petitioner herein excepting point (v) and (vi).
10. The petitioner being aggrieved by Order dated 15-12-2021 passed by the Learned Trial Court has come up with the instant application.

It is contended by the petitioner/plaintiff that the Learned Trial Judge acted illegally and with material irregularity in not allowing the local inspection on the points (v) and (vi) mentioned in the schedule of the said application filed by the petitioner herein inasmuch as the inspection on the said points are very much essential for proper and effective adjudication of the dispute and/or issue involved in the suit. It

is further contended that the Learned Trial Judge in the Court below failed to consider the nature of the reliefs as claimed in the plaint by the petitioner herein and in the counter claim by the opposite party Nos. 1, 2 and 2(A) to (D) herein and the common issues raised by the parties relating to the construction on the suit property very well necessitates and justifies allowing of local inspection of the entire points including point nos. (v) and (vi) as mentioned in the schedule of the application for inspection. It is also contended that the Learned Trial Judge in the Court below failed to consider the nature of the reliefs as claimed in the plaint by the petitioner herein and in the counter claim by the opposite party Nos. 1, 2 and 2(A) to (D) herein and the common issues raised by the parties relating to the construction on the suit property very well necessitates and justifies allowing of local inspection on the entire points including points nos. (v) and (vi) as mentioned in the schedule of the application for inspection filed by the petitioner herein.

Pursuant to the filing of this application notice was issued upon the opposite parties. Opposite party no. 1, and 2A to 2D entered appearance and contested the application. Opposite party no-3 did not enter appearance to contest the case in spite service of notice.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party no 1 and 2A to 2D perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that the Learned Trial Court erred in law in not allowing ground nos. (v) and (vi) as mentioned in the schedule of the application for inspection filed by the petitioner herein. Learned Advocate further submits that holding inspection on ground (v) and (vi) of the application under Order 39 Rule 7 of the Code of Civil Procedure is very much necessary for adjudication of the dispute in the suit. Learned Advocate also submits that the Learned Trial Court ought to have allowed the grounds nos. (v) and (vi) of the application when there is allegation of violation of the order of status-quo with regard to the suit property

passed by the Appellate Court. Learned Advocate for the Petitioner relies upon the following decisions.

Sisir Saha and Ors

Vs

Baby Begum @ Mehera Begum and Anr.

Reported in 2011(1) CLJ – Cal – P – 54.

Learned Advocate appearing for the opposite party no. 1 and 2A to 2D submits that there is no error in the Order passed by the Learned Trial Court. Learned Advocate further submits that there is no specific allegation against his clients in the plaint. Learned Advocate draws attention to Para – 8 of the plaint and submits that the plaintiff/petitioner has alleged that the private defendants are trying to make illegal construction and thus the allegation is not specific.

Upon perusing the petition under Order 39 Rule 7 and considering the impugned order passed by the Learned Court below this Court is of the view that in order to consider the legality of the order passed by the Learned Court below, first of all it is necessary

to consider the provisions contained in Order 39 Rule 7 of the Code of Civil Procedure. Rule 7 of Order 39 of the Code of Civil Procedure provides as follows:

Detention, preservation, inspection e.t.c. of subject matter of suit.

- 1) The Court may on the application of any party to a suit and on such terms as it thinks fit
 - a) make an Order for the detention, preservation or inspection of any property which is the subject – matter of such suit, or as to which any question may arise therein.
 - b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit and
 - c) for all or any of the purposes aforesaid authorize any samples to be taken or any observation to be made or experiment to be tried which may seem necessary or expedient for the purpose of obtaining full information or evidence.

- 2) The provisions as to execution of process shall apply mutatis mutandis to persons authorized to enter under this rule.

Thus upon plain reading of the provision contained in Order 39 Rule 7(1) of the Code of Civil Procedure it will appear that the Court on an application by any party for the purpose of preservation and inspection of subject matter of suit may authorize any person to enter upon into any land or building in possession of any other party to such suit. It will further appear that by such authorization order any samples may be taken or any observation made for the purpose of obtaining full information or evidence. Hence it is clear that although commission may not be issued for fishing out evidence on behalf of any party but collection of evidence cannot be totally discarded to preserve the suit property upon getting a picture of the condition of suit property.

In the case of Sisir Saha and Ors Vs Baby Begum @ Mehera Begum and Anr (supra) a learned Single Judge of this Court observed as follows:

‘By way of rejecting the application under reference the Learned Court below wrongfully directed the petitioners to proof the case by way of adducing evidence with regard to the existence of a public path on the plot of land in question which can only be ascertained by way of taking measurement of the plot of land in question and the plot adjacent thereto.’

This Court further made the following observation:

‘I do not find any substance in the submissions made on behalf of the plaintiffs/opposite parties that a disputed question of facts with regard to existence of a path way on a particular plot of land or to a plot of land adjacent thereto can be ascertained without taking physical measurement of the same by appointing Commissioner. I do not accept the submissions made on behalf of the plaintiffs/opposite parties that it is an attempt on the part of the petitioners for fishing out evidence. I do not find that the decision of Institution of Engineers (Supra) has any manner of application in this case in view of the distinguishable facts and circumstances of that case. In that case the issue was alleged forgery with regard to the proxy vote in connection with an election.’

In the case of Kalandi Swain Vs Braja Kishore reported in (1980) ILR. I Ori P-98 the Hon'ble Court observed that provision for inspection in Rule 7 has been enacted mostly for the purpose of keeping on record the existing condition of the property so that if the same is subjected later on to any change, determination or mischief by any of the parties or by any other agency or reason that can be known by the Court if and when required.

In the case of Allahabad Bank Vs Saurendra Nath Shaw reported in AIR – 1997. Cal 89 (DB) Hon'ble Division Bench of this Court observed that ascertaining the condition of demised premises by Court inspection falls within the purview of Order XXXIX Rule – 7 and not Order XXVI Rule – 9.

In the instant matter Learned Appellate Court while disposing an Appeal arising out of an Order passed in an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure was pleased to direct both the parties to the suit to maintain status-quo in respect of nature character and possession of the suit properties ("B" and "C" schedule) and not to change the nature and character of the said properties till disposal of the application under Order 39 Rule

1 and 2 of the C.P.C. In the application under Order 39 Rule 7 of the Code of Civil Procedure the petitioner/plaintiff alleged that in spite of injunction order passed by the trial Court and appellate Court the defendants by gross violation of the said orders as well as the Building Rules of the Howrah Municipal Corporation are making such illegal and unauthorized construction over the said property in collusion with the men and agents of Howrah Municipal Corporation. It was contended that for preservation detention and inspection of suit property and for bringing clear picture and actual topography of suit property appointment of Advocate Commissioner is necessary.

The following points were submitted by the petitioner for inspection by Advocate commissioner.

- i) To go to the locale and to draw the rough sketch map of the schedule "A", "B" and "C" mentioned suit properties of the plaint as well as injunction application.
- ii) To note that the nature character of the schedule mentioned suit properties of the plaint as well as injunction application.

- iii) To note that whether there is any construction work is going at and over the schedule “B” and “C” mentioned suit property of the plaintiff as well as injunction application or not? If any to note in what extent?
- iv) To note that whether there is any building materials gathered in the schedule “B” and “C” mentioned suit property of the plaintiff as well as injunction application or not?
- v) To note that whether the defendants are making construction over the “B” schedule mentioned property by leaving 4 ft wide mandatory side space in the four side of the “B” schedule mentioned property or not?
- vi) To note and take lineal measurement how many gape is prevailing between the schedule “A” and “B” mentioned suit property at present?
- vii) To note the other locale feature or features at the time of holding commission work if any.

It further appears that no affidavit of objection was filed to the petition under Order 39 Rule 7 of the Code of Civil Procedure by the opposite parties.

Learned Trial Court while allowing the prayer for appointment of Advocate Commissioner directed inspection by the Learned Commissioner to points of the schedule as submitted by the petitioner, except point no (v) and (vi) on the ground that allowing the same will tantamount to fishing out of evidence.

Upon considering the application under Order 39 Rule 7 of the Code of Civil Procedure filed by the plaintiff/petitioner it will appear that the petitioner alleged violation of the order of injunction of the Learned Trial Court and appellate Court with regard to “B” and “C” schedule properties and carrying out construction in violation of Building Rules. Thus for the purpose of preservation of suit property it is necessary that local inspection should be carried out with regard to point (i) to (vi) of the schedule as submitted by the petitioner. As points (i) to (vi) are inter-related inspection should be carried out on all the points mentioned in the schedule, and none of the points can be ignored. As Order 39 Rule 7 of the Code of Civil

Procedure has empowered the Court to make an order for detention preservation or inspection of any property which is the subject matter of such suit, and for the said purpose authorize any samples to be taken or any observation to be made or experiment to be tried which may seem necessary or expedient for the purpose of obtaining full information or evidence, such order when necessary for preservation or inspection of suit property should not be refused on the ground that it will amount to fishing out of evidence for a party. Thus the order of Learned Trial Court cannot be sustained without modification.

Hence this Revisional Application stands disposed. Order dated 15/12/2021 passed by Learned Civil Judge Junior Division 5th Court Howrah in T.S. 689 of 2020 stands modified to the extent that Learned Pleader Commissioner shall hold Local Inspection on all the points mentioned in i) to vii) of schedule – “A” of application under Order 39 Rule 7 and 8 of the Code of Civil Procedure. Other contents of the order of Trial Court remain unaltered.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

Biswaroop Chowdhury,J: