

06.06.2023
Srimanta
Sl. No. 29
Ct. No. 652

CO/441/2019

Birendra Nath Das & Anr.
-Vs.-
Suprim Sardar & Anr.

Mr. Mukteswar Maity,
Mr. Nupur Chowdhury

...for the petitioners.

Mr. Gautam Chakraborty,
Mr. Kartik Kumar Ray

...for the opposite parties.

Being aggrieved and dissatisfied with Order No. 55 dated 4th October, 2018 passed by learned Civil Judge (Junior Division), 3rd Court, Baruipur, South 24-Parganas in Title Suit No. 85/2015, present application under Article 227 of the Constitution of India has been preferred. Petitioner contended that the petitioners through their constituted Attorney filed the aforesaid suit for declaration and permanent injunction. In the plaint plaintiffs have specifically prayed for a declaration so that the defendants may not encroach their property and also for ascertainment of the western side boundary of the suit premises. However, by way of amendment plaintiffs subsequently amended the plaint and has incorporated in paragraph '2 Ka' of the plaint that during pendency of the suit the defendants have illegally encroached 4 satak of land in the western side of the property. Now in order to ascertain the western side boundary of the suit property and also to adjudicate the real controversy between the parties the plaintiffs filed an application under Order XXVI Rule 9 of the Code of Civil Procedure before learned Court below. Against the said application the defendants filed objection contending that plaintiffs

have only mentioned for making local investigation in connection with plot no. 232 but he has not stated anything for measurement of plot nos. 229 and 230 owned by the defendants. Now if the allegation of encroachment levelled by the plaintiffs is required to be ascertained by way of local investigation commission, then plot no. 232 owned by plaintiffs is required to be measured investigated along with the plot nos. 229 and 230 owned by defendants.

However, learned Court below after hearing both the parties was pleased to observe that the plaintiff has not pleaded in the plaint that defendants have encroached plaintiffs' 4 satak of land and plaintiffs have also not made any specific allegation of encroachment against the defendants and as such court below rejected aforesaid application for local investigation.

Mr. Maity, learned Counsel appearing on behalf of the petitioners submits that the Court below was wrong in observing that there is no allegation of encroachment in the plaint or that no such relief for ascertainment of boundary has been prayed by the plaintiffs. On the contrary, for ascertainment of the real controversy between the parties the proposed amendment is very much required and as such he has prayed for allowing the investigation application after setting aside the order impugned.

Mr. Chakraborty, learned Advocate appearing on behalf of the opposite parties raised strong objection and contended that the Court below was justified in passing the order. In this context, he contended that the suit itself is not maintainable since the suit has been filed by a constituted Attorney and as such the suit is barred under the provision of Order VI Rule 14 and Order VI Rule 15 of the Code of Civil Procedure.

He further contended that in the prayer portion of the plaint plaintiffs have not made any amendment to seek appropriate relief and for all these the Court below was justified in rejecting the said application for local investigation commission.

Having considered the facts and circumstances of the case and the submissions made on behalf of both the parties, it appears that the Court below was clearly erred in holding that there is no allegation of encroachment made by the plaintiffs in the plaint. In fact, in the prayer portion of the plaint the plaintiffs have clearly stated in prayer (b), for ascertainment of the boundary in the western side of the suit property. Furthermore by way of amendment he has also incorporated in paragraph '2 (Ka)' that during pendency of the suit the plaintiffs have encroached 4 satak of land in the western side. In the above backdrop for ascertainment of the real dispute between the parties, the local investigation commission is very much required. However, in order to ascertain as to whether there is any encroachment or not, the objection raised by the opposite parties is justified that the local investigation commission/ measurement must not be confined to the plaintiffs' plot no. 232 only but it must be measured in terms of land owned by the defendants being plot nos. 229 and 230.

In view of above, the order impugned being Order No. 55 dated 04.10.2018 is hereby set aside. Learned Court below is hereby directed to appoint a local Investigation Commissioner within a period of four weeks from the date of communication of the order who will make investigation commission in terms of the schedule of work mentioned in the local investigation Commission petition. However, in order

to ascertain the point of encroachment the learned Commissioner will measure and investigate not only plaintiffs' plot no. 232 but also defendants' plot nos. 229 and 230 and to submit a report specifying the details of his work including measurement within a period of 12 weeks from the date of his appointment. The cost of the commission work will be borne by the plaintiffs and the name of the Commissioner and the amount of commissioner's fee to be deposited by the plaintiffs shall be decided by the Court below.

C.O. 441 of 2019 is, accordingly, disposed of.

Learned Commissioner will conduct his commission work after serving notice upon both the parties.

(Ajoy Kumar Mukherjee, J.)