

17.08.2023
Sl. No.6(DL)
srm

C.O. No. 593 of 2023
Sri Rasaraj Mahato & Ors.
Versus
Sri Arun Chandra Mahato & Anr.

Mr. Chittapriya Ghosh

...for the Petitioners.

The order dated January 6, 2023 passed in Title Suit No.473 of 2017 by the learned Civil Judge (Junior Division), 2nd Court at Purulia, is under challenge in this revisional application.

By the order impugned, the learned court below rejected an application under order XXVI Rule 9 of the Code of Civil Procedure. The learned court below held that in a suit for declaration of title and permanent injunction, the question of local investigation would not arise. The case in hand was not regarding any boundary dispute. Neither was there any allegation of encroachment. No prayer for recovery of possession was made. According to the learned court below, the averments in the plaint did not reflect that there was any dispute which was required to be elucidated by a local investigation.

The plaint has been perused by this Court. The plaint case was that the plaintiffs had valid right, title and interest over the suit land. The defendants did not have any right, title, interest and possession over the said land. In spite of the same, the defendants, with ill motive, tried to grab the land of the plaintiffs and threaten the plaintiffs. The plaintiffs were apprehensive that the defendants would forcefully take possession and deprive the plaintiffs' of their right, title and interest in respect of the schedule land. The plaintiffs were in actual physical possession of the property and had asserted their right, title and interest thereon.

The prayers were for declaration of title of the plaintiffs in the suit land as described in the schedule of the plaint and for permanent injunction restraining the defendants from disturbing and interfering in any manner with the possession of the plaintiffs in the suit land. The defendants filed their written statement and submitted that they were in possession of the land in question by construction of a mud house.

Admittedly, neither the plaint case nor the defence case records that there was any dispute with regard to the boundary. No allegation of encroachment by the plaintiffs against the defendants in respect of any schedule land had been made. The suit was for declaration of right, title and interest of the plaintiffs and permanent injunction against the

defendants. The plaintiffs claim to be in possession of the said land. Hence, the onus was on the plaintiffs to prove their case. The application under Order XXVI Rule 9 of the Code of Civil Procedure was misconceived as in the facts of the case, there was no requirement for any local investigation to elucidate any dispute which would throw some light on any particular issue either with regard to boundaries or with regard to any encroachment of the land by the defendants or demarcation of land. Both parties claim right, title, interest and possession in respect of the property.

The Hon'ble Supreme Court has also considered the scope of Order XXVI Rule 9 and held that the provision of Order XXVI Rule 9 is to be invoked if the controversy is regarding demarcation of the land between the parties.

The Hon'ble Supreme Court in the matter of *Haryana WAQF Board v/s Shanti Sarup and Ors.*, reported in (2008) 8 SCC 671, has held that if the controversy is regarding demarcation of the land between the parties, the Court should direct the investigation by appointing a legal Commission. Para 4 and 5 of the aforesaid judgment is reproduced 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 allegations of unauthorised 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."

Order XXVI, Rule 9 of the Code, inter alia, provides that 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, 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. Meaning thereby, that it has to be the satisfaction of the Court that a local investigation is necessary or proper for the purpose of elucidating any matter in dispute. This provision is not a tool which is to be permitted to be used by the parties concerned to create evidence in their favour.

This Court further finds that points for local investigation were not sustainable in law. Whether there was a structure on the suit plot, who were in possession of the suit plot, whether there were trees on the suit plot and whether there were any other special features on the suit plot, are not to be brought on record by way of local investigation.

In my view, the learned court rightly rejected the application. The application, if allowed, would amount to fishing out of evidence by the plaintiffs. The same cannot be encouraged.

The revisional application is, thus, dismissed.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)