

13.1.2023  
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Ct. no. 652  
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**C.O. 1319 of 2018**

**Soma Biswas & Anr.**  
**Vs.**  
**Smt. Dipannita Roy & ors.**

Mr. Amitabha Ghosh  
Ms. Nabanita Chatterjee ...for the petitioners

Mr. Amit Rakshit  
Mr. Balaram Neogi ....for the O.P. no. 1

Mr. Supriya Roy Chowdhury  
Mr. Sankar Ghosh  
...for the Barasat Municipality

Being aggrieved and dissatisfied with the order no 25 dated 26.7.2017 passed in Title suit no. 194 of 2013 by the learned Civil Judge (Junior Division), 1<sup>st</sup> Court, Barasat, present application has been preferred.

The petitioners contended that the predecessor-in-interest of the present petitioners/plaintiffs, filed aforesaid suit against the defendants/opposite parties before the learned Civil Judge (Junior Division), 1<sup>st</sup> Court, Barasat for declaration, mandatory and permanent injunction and also filed application for temporary injunction under Order XXXIX Rule 1 and 2 read with Section 151 of the Code of Civil Procedure. The defendant/opposite party no. 1 appeared in the said suit and filed written objection.

After the death of original plaintiff, the petitioners were substituted and they filed an application under

order XXVI rule 9 of the Code for local investigation Commission to substantiate the allegations made in the plaint, which was rejected on contest by the learned trial court.

Challenging the said order, the present petitioner preferred a revisional application before this court being C.O. 2449 of 2016 and after hearing the said application, this court was pleased to reject the said revisional application by the order dated 7<sup>th</sup> February, 2017. While disposing said revisional application, this court was pleased to observe as follows:-

*“....I have perused the copy of plaint. I do not find that the plaintiffs have made out any case that the defendants have encroached upon their lands(plaintiffs’) so the suit property does not require any sort of measurement by survey knowing commissioner because the dispute with regard to leaving side space can well be determined by way of a simple local inspection and in the present case by submission of the replies which the plaintiffs have since obtained from the Municipality in that regard.”*

thereafter, the petitioners filed petition for local inspection commission under Order XXXIX rule 7 of the Code which was heard by the learned trial court and by the impugned order dated 26.7.2017, learned court below was pleased to reject the said application for local inspection commission on the ground that the points for inspection as enumerated in the petition, cannot be treated as subject matter for local inspection as the same is required to be proved in evidence and the court below further observed that such prayer appears to have been

filed for collecting evidence which is not permissible by law.

Learned counsel for the petitioners submits that the order impugned is irrational, self-contradictory and without any apt. The trial court below has erred in observing that the petition for local inspection commission, has been filed to collect evidence. Learned trial court while passing the impugned order, did not consider the observation made by this court in C.O. 2449 of 2016. The trial court ought to have considered that the nature of the allegations regarding the space left by the defendant/opposite party at the time of construction of her house over her land cannot be adjudicated on the basis of oral evidence and the camouflaging answers given by the Municipality against the letters sent under the Right to Information Act, will not help the court to adjudicate the controversy. Accordingly, the court below ought to have allowed the said application.

Learned counsel for the opposite party nos. 1 and 2, opposed the prayer and contended that the said local inspection commission is not at all required for the purpose for adjudicating real controversy between the parties and that the application has been filed by the petitioner only with an object to collect evidence which is not permissible in the eye of law. Accordingly, they have

submitted that the order impugned is not required to be interfered by this court.

Considered the submissions made by both the parties. I have perused the schedule of amendment of the local inspection commission and the order impugned and also the order passed by this court in C.O. 2449 of 2016.

On perusal of the order passed by this court in C.O. 2449 of 2016, it appears that this court does not find that the plaintiff has made out any case that the defendants have encroached upon their lands so that the suit property is required to be measured by any survey knowing commissioner, because the dispute with regard to the leaving side space can well be determined by way of simple local inspection commission.

Learned Trial court while disposing the said application, has mentioned all the points for local inspection commission in the order but he came to a finding that the points for local inspection commission appears to have been meant for collecting evidence and the point as to whether, defendant no. 1 by violating the municipal rules has raised construction or not, cannot be determined by way of local inspection commission, which can only be adjudicated by taking evidence, to be adduced on behalf of both the parties.

On perusal of the schedule of amendment, it appears that the point no. (a) of the schedule for local

inspection commission relates to ascertainment of possession, which if allowed for inspection, would amount to fishing out evidence but in respect of point nos. (b) to (l) of the schedule of local inspection commission, petition I find that this can be allowed as it may help the court to adjudicate controversy and moreover, if local inspection commission is held in respect of those points excluding point (a) that would not amount to fishing out evidence.

In view of above, C.O. 1319 of 2018 is allowed in part. Learned court below is directed to appoint a local inspection commissioner who will conduct local inspection commission in term of the point nos. (b) to (l) of the schedule of local inspection petition, within a period of four weeks from the date of communication of the order and learned Commissioner will submit a report within a period of eight weeks from the date of appointment. The learned court will fix the name of the Commissioner and the fees of the Commissioner before issuance of writ for local inspection commission. The commission will be conducted at the cost of the petitioner. It is made clear that this court has not entered into the merits of the case.

Urgent Photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

**(Ajoy Kumar Mukherjee, J.)**