

16.5.2023
4
Ct. no. 652
sb

C.O. 1160 of 2021

**Rabiul Sarkar
Vs.
Eskaf Sarkar & Ors.**

Ms. Partha Pratim Roy ...for the petitioner

Mr. Tanmoy Mukherjee
Mr. Souvik Das
Mr. K. Raihan Ahmed
Mr. Rudranil Das ...for the Opposite parties

Being aggrieved and dissatisfied against the order dated 18.12.2020 passed by learned Civil Judge (Senior Division), Lalbagh, Murshidabad in Misc. case no. 3 of 2013 arising out of Partition Suit no. 32 of 2008, present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that the petitioner herein as plaintiff filed aforesaid suit for partition and for permanent injunction against the opposite parties herein which was registered as Partition Suit no. 32 of 2008. The said suit came up for hearing on 22.8.2012 and by order no. 21, the learned court decreed the suit ex parte against the defendant/opposite parties herein. Accordingly, an advocate Commissioner was appointed for drawing up final decree. Learned Commissioner after completion of the commission work, submitted report before the court below.

The defendants/opposite parties herein after coming to know about the said ex parte decree filed an application under Order IX Rule 13 of the Code of Civil Procedure, with a prayer for setting aside the aforesaid ex parte decree and the same was registered as Misc. Case no. 3 of 2021 as above. It is alleged that subsequently the defendants started construction over the best portion of the suit property though the order of injunction was passed by the learned court at the time of hearing of the aforesaid suit for adjudication of preliminary decree, and therefore, the said order of injunction is still subsisting. The plaintiff filed an application inter alia prayed for imposition of the said order of injunction in the present proceeding also.

The petitioner submits that for proper adjudication of the suit, the petitioner filed an application under order XXXIX rule 7 of the Code of Civil Procedure for holding local inspection commission to ascertain wherein the construction is going on over the suit property in aforesaid Misc. case no. 3 of 2021. The defendant no. 7 herein contested the said application by filing written objection denying the allegations. Learned court below by the impugned order, was pleased to reject the said application holding that the points mentioned in the local inspection commission is the subject matter of local investigation commission and as such local inspection commission is not necessary.

Learned counsel for the petitioner/plaintiff submits that learned court below erred in holding that the points mentioned in local inspection commission are the subject matter of local investigation commission and he has illegally rejected the application for local inspection commission without considering that for proper adjudication of the dispute between the parties, local inspection commission is necessary. Accordingly, he has prayed for setting aside the aforesaid order.

Learned counsel for the opposite parties/defendants submits that the court below was justified in rejecting the petitioner's prayer for local inspection commission. He pointed out that point no. 2 of the schedule of local inspection commission proposes that the local inspection commission is necessary to ascertain whether any construction has been raised in the "plaintiff's allotted portion" along with sketch map.

Considering the submissions made by both the parties, it appears that the petition for local inspection commission has been filed in the proceeding under Order IX rule 13 of the Code of Civil Procedure being Misc. case no. 3 of 2013. On bare reading of Rule 13, it is clear that in order to adjudicate a proceeding under order IX, rule 13, court is only required to test two things (i) whether the summons was duly served and/or (ii) whether sufficient cause has prevented petitioner from appearing when the case was called on for hearing.

Accordingly to adjudicate said two questions in a proceeding under Order IX rule 13, prayer for local inspection commission to show about alleged construction on the suit property is absolutely uncalled for and not at all required for adjudication of the dispute therein. As such ultimate finding of the court below does not call for any interference.

Accordingly, C.O. 1160 of 2021 is dismissed.

However, this order will not preclude the plaintiff/petitioner to make same application in the pending suit for passing final decree being Partition suit no. 32 of 2008. Moreover, it appears that the application under Order IX rule 13 being Misc. case no. 3 of 2013 is pending for last ten years. Accordingly, the court below is directed to dispose of the defendant's application under order IX rule 13 of the Code of Civil Procedure being Misc. case no. 3 of 2013 within twelve weeks from the date of communication of the order.

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

(Ajoy Kumar Mukherjee, J.)