

Ct.
No.
652

03.07
2023

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C.O. 2062 of 2019
Humayun Kabir Bora & Ors.
-Versus-
Kamruzzaman Bora & Ors.

Ms. Sulekha Mitra
Mr. Manas Kumar Das
Mr. Aritra Kumar Thokdar ...For the Petitioners

Mr. Arup Banerjee **...For the Opposite Parties**

Being aggrieved by and dissatisfied with the order No. 98 dated 8th April, 2019 passed in Title Suit No. 114 of 2001 by the learned Civil Judge (Junior Division), Kalna Purba Bardhaman, the instant application has been preferred by the petitioners.

The petitioners contended that father of the opposite parties No. 1 to 6 is the original plaintiff who filed the aforesaid Title Suit No. 114 of 2001 against the petitioners and the opposite party Nos. 7-12 impleading the proforma opposite party No. 13 as proforma defendant, inter alia praying for a decree for permanent injunction restraining the petitioners and the opposite parties No. 7 to 12 from creating any obstruction on the pathway marked with letter A, B, C, D, E, F, G and H as described in Schedule 'B' to the plaint and also for declaration that the 'B' Schedule pathway is the joint property of the petitioner, original plaintiff (father of the opposite parties No. 1 to 6) and the opposite parties 7 to 12 and alternatively easement right of the original plaintiff over 'B' Schedule path way.

The opposite parties No. 1 to 6 filed an application praying for an order of injunction before the Court below. Thereafter, opposite parties No. 1 to 6 along with the plaint also filed an application under Order XXXIX Rule 7 of the Code of Civil Procedure inter alia praying for an order of

appointing a Commissioner for local inspection and the said prayer for local inspection was also allowed by the Court below.

On 24th April, 2001, the learned Advocate commissioner submitted his report. The petitioners herein appeared in the said suit and filed written statement. On 18th April, 2002 the original plaintiff filed an application under Order XXXIX Rule 7 of the Code for local inspection for the second time but such prayer for local inspection for the second time was rejected by the Court below.

The father of the opposite parties 1 to 6, being the original plaintiff filed a revisional application against said order and such revisional application being No. 3 of 2003 was rejected on contest.

Thereafter, the original plaintiff filed an application for amendment in respect of which the petitioner filed written objection at the time of hearing. The said prayer for amendment was also rejected by the Court below. The suit is posted for framing of issues.

Subsequently, the petitioners came to know that the application under Order VI Rule 17 has been allowed by the Court below on 13.2.2019 and for which the petitioners filed application for recalling the order dated 13th February, 2009. In the meantime, the opposite parties 1 to 6 filed an application under Order XXVI Rule 9 of the Code of Civil Procedure, inter alia, praying for local investigation on the points mentioned therein.

The petitioners herein filed written objection against the application for local investigation and the learned

Court below without considering the written objection and written statement filed by the petitioners allowed the application under Order XXVI Rule 9 of the Code by the impugned order, which is a cryptic one.

Ms. Sulekha Mitra, learned Counsel appearing on behalf of the petitioner submits that the present application has been filed only to collect evidence which is not permissible in law. The application has also been filed to delay the final proceeding of the suit. The order impugned is a non-speaking order. Learned Court below while passing the order has not considered the contention of the defendants mentioned in the written statement and written objection. Learned Court below also failed to consider that the points upon which the earlier local inspection was held, are mostly same in the petition for local investigation commission and as such further local investigation is not at all necessary. The dispute between the parties is, whether there is any pathway over the B Schedule property or not, which can very well be proved by adducing independent evidence but collection of evidence by way of investigation commission is not permissible to prove the said issue. The learned Court below failed to adjudicate the real controversy between the parties. Accordingly, the petitioners have prayed for setting aside the order impugned.

Mr. Arup Banerjee, learned Counsel appearing for the opposite parties submits that the purpose of the local inspection commission and investigation commission are completely different and in case of local investigation commission, the question of fishing out evidence does not arise. In this context he relied upon the decision of this Court in the case of *Duncun International (India) Ltd. Vs. Anglo*

India Jute Mills Co. Ltd. and Ors. reported in 2022 SCC OnLine Cal 4287 and another decision of the Hon'ble Apex Court in the case of *Haryana Waqf Board Vs. Shanti Sarup and Ors.* reported in (2008) 8 SCC 671.

I have considered the submissions made by both parties.

On perusal of the Schedule of plaint it appears that the plaintiffs' prayer in connection with the said suit is for permanent injunction restraining the defendants from raising any obstruction on the pathway over B Schedule property and also for declaration that the B schedule property is a joint property of the plaintiffs and defendants and alternatively right of easement over the B Schedule property. B Schedule property has been described in the plaint which according to plaintiff is a pathway originated from south-western portion plot No. 43 and proceeding towards north over ploy No. 41 and 56 and thereafter over plot No. 42 and 57 and thereafter terminates. The path is 10 feet width over plot No. 43 and over plot No. 41 and 56 the path is width about 13 feet and thereafter the path is width about 12 feet.

In the points for local investigation the plaintiff has prayed for determination of 4 boundary point of suit plot No. 42, 56 and 57 of Mouza Dewangadi and to direct the commissioner to point out the pathway over the plot No. 42, 56 and 57 and to take the measurement of the same.

It is true that in an earlier inspection learned Commissioner has submitted a report that he found a mark or sign of pathway over the western side of plot No., 43 and eastern side of plot No. 41 and 56. It is not clear how the local inspection commissioner has pointed out the plot nos.

without making any survey in respect of the said plots. Accordingly, it may be presumed that on the basis of indication as made by the parties, during local inspection commission, such reporting was made by local inspection commissioner. The purpose of local investigation commission is to elucidate boundary and extent of the suit plots covering 'B' schedule and its measurement which cannot be ascertained by a local inspection commissioner, who is supposed to file a report on local features on the basis of inspection and as pointed out by the parties and their Counsel at the time of inspection work with an object of detention preservation and inspection of any property which is the subject matter of the suit or as to which any question may arise in the suit.

Since, undisputedly the Court below is required to adjudicate the right, title and interest of the parties over the B Schedule property comprising of several plots then the local investigation commission can only help to ascertain 'B' schedule in order to adjudicate the controversy between the parties. Question of collection of evidence can arise in case of local inspection commission but object of local investigation commission is not to collect evidence but to obtain evidence which from its peculiar nature can only be had from the spot. Of course order XXVI rule 9 is not meant to collect evidence where it can get the evidence itself, but for the present, it appears that extent and location of 'B' schedule is the vital aspect in the matter in controversy.

In view of such matter the ultimate finding of the Court below does not call for any interference.

The revisional application, being C.O. 2062 of 2019 is dismissed.

However, since the suit is pending for a considerable period of time since 2001, the learned Investigation Commissioner is directed to conclude the commission work and will submit his report within a period of 12 weeks from the date of communication of this order and the Court below will make every endeavour for expediting the final hearing of the suit and to conclude the entire proceeding preferably within a period of 10 months from the date of communication of this order.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)