

Item No. 17
18.08.2023
Court. No. 19
GB

C.O. 2473 of 2023

Merrill Vihar LLP
Vs.
Dipen Jele & Ors.

*Mr. Chayan Gupta,
Ms. Rituparna Chatterjee*

...for the Petitioner.

This revisional application arises out of an order dated June 6, 2023 passed by the learned Civil Judge (Junior Division), 5th Court at Howrah in Title Suit No.429 of 2023.

By the order impugned, the learned court below allowed an application under Order 39, Rule 7 read with Section 151 of the Code of Civil Procedure. The learned court held that before deciding the application for injunction, the present status of the property was required to be determined by way of a local inspection.

According to the plaint case, the plaintiff and the proforma defendants in the suit, claimed to be owners of undivided 'B' schedule property, which was part and parcel of 'A' schedule property. It was alleged that the defendants were changing the nature and character of the suit property. The suit was for declaration and permanent injunction.

The plaintiff stated that the defendants were filling up the property by raising a construction over the suit property, thereby changing the nature and character of the same. An injunction was prayed for against the defendants.

In the application for local investigation, it was stated that in order to bring on record the actual topography of the

property, it was necessary to appoint a learned advocate commissioner, to conduct local investigation. No party could be allowed to change the nature and character of an undivided property, before their rights were adjudicated.

The court allowed such prayer.

According to the petitioner, such order could not be passed as it would amount to allowing the plaintiff to fish out evidence. That the defendant being owner of a portion of 'A' schedule property could not be enjoined. That 'B' schedule property being impossible to demarcate, no declaration could be passed and hence no injunction could be granted.

The learned court found that the property was a pond, some portion of which were owned by the plaintiff and some portions of which were owned by the defendants.

Therefore, the learned court held that in order to decide whether the defendant should be permanently restrained from changing the nature and character of the 'A' schedule property or whether there should be any order of injunction, when both parties were claiming ownership over undemarcated A and B schedule property, the exact status of the property and the real picture, should be ascertained. Accordingly, the local inspection was allowed on the following points:-

1. *"To draw a rough sketch map of the A scheduled suit property"*
2. *"To note down the topography of A scheduled suit property"*
3. *"To note down any other features of A scheduled suit property, not amounting to fishing of evidence, that the Ld. Commissioner deems fit and proper at time of holding inspection."*

Mr. Gupta, learned advocate for the petitioner submits that it was a specific case of the defendants that the property had been purchased by the defendant. The same was a demarcated property, surrounded by a boundary wall since long. Thus, the question of local inspection in order to ascertain whether any boundary wall was being raised or the nature and character of the property was being changed, would not arise. Conversion had already been effected. Moreover, the question of change of topography would not arise as there were already existing godowns.

This Court finds that before deciding the application for injunction, could be decided, the learned court was of the view that as the property was a pond and both parties had claimed certain shares in the same, it was a fit case to ascertain the exact nature of the suit property in question, in view of the allegations against the defendants. The property was not demarcated.

This Court does not find any reason to interfere with the order impugned. The order impugned is upheld.

The decisions in the matter of ***The Institution of Engineers (India) & Anr. versus Bishnu Pada Bag & Anr.*** reported in ***1977 SCC OnLine Cal 266*** and in the matter of ***Satish Agarwal & Ors. versus Tirath Singh*** reported in ***1995 SCC OnLine Cal 379*** do not come to the aid of the petitioner for the following reasons:-

- a) In *The Institution of Engineers (India)* (Supra), the issue was whether local inspection could be allowed to count the votes when the challenge in

the suit was irregular counting of votes. Such local inspection would aid the plaintiff in proving his case.

- b) With regard to Satish Agarwal (*supra*), the prayer for local investigation was made after the evidence was closed. The court held that such prayer could not be allowed in order to fish out evidence and to fill up the lacuna in the evidence.

Local inspection under Order 39, Rule 7 of the Code of Civil Procedure is a mechanism by which the court can ascertain whether the physical features of the suit property were altered, so that the Court may be in a position to either pass interlocutory orders protecting the property from damage or in case of any mischief at a later date, can refer back to the order of local inspection to decide what orders could be passed in the suit. In this case, the court was required to ascertain whether some protective orders were necessary, on the allegation by the plaintiffs that the defendants who also owned 'A' schedule property were actually changing the nature and character of the property, by filling up the pond and raising a construction.

Accordingly, the revisional application is dismissed.

This court has not gone into the merits of the dispute between the parties.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)