

8.8.2023
18
Ct. no. 652
sb

**CO 3114 of 2022
(Assigned Matter)**

**Arka Shaktighar
Vs.
Smt. Chaya Chandra & Ors.**

Mr. Susanta Pal
Mr. Samir Das ...for the Petitioner

Affidavit of service filed by the petitioner is taken on record. In spite of service, opposite parties are not represented.

This is an application under Article 227 of the Constitution of India against the order dated 8th September, 2022 passed by the learned Civil Judge (Senior Division), 3rd Court, Alipore, South 24 parganas in Title Suit no. 378 of 2019.

The petitioner contended that the petitioner is a registered cooperative society against whom the plaintiff/opposite parties herein have filed aforesaid suit seeking declaration and permanent injunction in respect of a land measuring about 25 decimals. The plaintiff/respondents have alleged in the plaint that in April, 2015, some unknown persons were visiting the suit property and enquiring about the ownership from local people. The plaintiff filed the present suit with the plea that on and from 4th April, 2019, the petitioner

herein/defendants through its members have started creating nuisance and annoyance in and around the suit property and they have further alleged that the petitioner/defendant Samity were making enquiries with the intention to trespass and grab the suit property claiming ownership in the suit property.

The defendants in the written statement have denied the allegation of the plaintiff/respondent and in their written statement they have stated that the defendant enjoys the property within the ambit and territory of their acquired property as per Mouza map and/or plan which situates within a separate Garden Reach Mouza. There is no nexus in respect of the property of the defendants and the plaintiff's property but as the dispute has been raised by the plaintiff in regard to unguarded portion of the defendants land in the garb of the suit by claiming their ownership, the petitioner herein/defendant had filed an application under Order XXVI rule 9 of the Code of Civil Procedure praying for proper relayment of survey work by local investigation commission. Learned court below after hearing the parties, was pleased to reject the defendant's application under Order XXVI rule 9 of the Code.

Learned counsel for the petitioner submits that learned court below has failed to exercise his jurisdiction so vested and had acted in exercise of its jurisdiction with material irregularity.

Learned court below also failed to appreciate that demarcation of the territory of the property of the petitioner is necessary and the same may be done by proper measurement and by survey work. Accordingly, he has prayed for setting aside the order impugned and for allowing the defendant's prayer for local investigation commission.

I have gone through the prayer for local investigation commission wherefrom it appears that the petitioner in his application, has clearly mentioned that the prayer made in the plaint purely relates to declaration of plaintiff's right title and interest in the suit property and for declaration that the defendants have no right to disturb the plaintiff's possession in the suit property in any way or in any manner whatsoever and for passing decree for permanent injunction. Accordingly, in the plaint, no boundary dispute nor case of encroachment against the defendant has been made and the defendant/ Samity also have stated that they have no intention to encroach the plaintiff's land. On the contrary the plaintiff taking advantage of defendant's unguarded portion of land is trying to trespass in that property.

It appears from record that plaintiff has opposed defendant's prayer for local investigation commission by filing written objection and has prayed for dismissal of said application. Both the parties have contended that they are in possession of their respective portion.

From a bare reading of the rule 9, it is evident that a court can appoint a commissioner for elucidating any point in dispute. In the present case, there is no dispute regarding possession of respective land. The court below dismissed the application on the ground that the suit property and the property of defendant are not adjacent to each other and defendant specifically stated in his petition that there is no nexus of the property of the defendant and the property of plaintiff and the properties are situated in different mouzas. The view taken by the court below does not appear to be erroneous or perverse. In my view, the court has acted lawfully in exercise of its jurisdiction. Where there is dispute as regards the identity of suit property, court should appoint a Commissioner but the power to appoint of Commissioner for local investigation cannot be exercised by the court to assist party to collect evidence, where it can get evidence itself.

In such view of the matter, the order impugned does not call for any interference. Accordingly, C.O. 3114 of 2022 is dismissed.

However, the learned court below is directed to make every endeavour for expeditious disposal of the suit and since the suit is pending for a considerable period of time, the learned court below shall conclude the entire proceeding of the suit, preferably within a period of eight months 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.)