

June 12, 2023
Sl. No.07
Court No.19
s.biswas

CO 3514 of 2022

Abu Kalam Mondal and another
vs.
Roshonara Mondal

Mr. Sounak Bhattacharya
Mr. Sounak Mandal
Mr. Anirban Saha Ray

... for the petitioners

Mr. Debanik Banerjee
Mr. Anirudha Ganguly
Mr. Krishna Chandra Dey

... for the opposite party

The revisional application is directed against the order dated November 9, 2022, passed by the learned Civil Judge (Junior Division), 2nd Court at Baruipur, South 24 Parganas, in Misc. Pre-emption Case No.62 of 2019. By the said order, the learned court below allowed the application under Order 39 Rule 7 read with Section 151 of the Code of Civil Procedure filed by the opposite party. The opposite prayed for appointment of a survey passed commissioner to note down the following:

- i) To note dilapidated condition of shop room situated on the schedule suit property and their condition in details.
- ii) To note dilapidated condition of broken boundary walls surrounding the suit property and their condition in details.
- iii) Whether tin shed of the schedule shop room was damaged or not? If so note down in details of such damaged condition of the said tin sheds. Whether such tin sheds were necessary for repair

and/or replacement by using new tin or pucca wall construction?

iv) Any other local features, if any.

The learned court below was of the view that in order to decide the question of local inspection, a learned advocate commissioner would suffice the purpose and hence, instead of appointing a survey passed commissioner, learned court below directed as follows:

“That the petition under order XXXIX rule 7 read with Sec. 151 of the CPC filed by opposite party on 27.09.2022 is considered and allowed on contest with any order as to cost.

Let **Smt. Sima Mondal** Ld. Advocate of this Bar be appointed as local inspection commissioner in this suit for holding local inspection on the points started below.

1. To note whether any shop room is there on the schedule premises?

2. To note down the condition of the same if there is any?

3. To note down whether there is any boundary wall in the schedule premises?

4. To note down the condition of the same, if there is any?

5. To note down local features?

The opposite party is directed to deposit a sum of **Rs.2000/-** in court towards the consolidated cost of the Ld. Commissioner at once.

The learned Commissioner is directed to visit the locality and hold the inspections of

the points stated above after due service of notices upon the parties.

Issue writ accordingly.

Ld. Commissioner is specifically directed to file her report by next date positively.

Opposite party is directed to file requisite at once.

The petition is disposed.

To date (17.12.2022) for commissioner's report, hearing of petition u/o I Rule 10(2) of CPC."

Mr. Bhattacharya, learned advocate appearing on behalf of the pre-emptor, submits that the application under Order 39 Rule 7 of the Code of Civil Procedure has been filed in order to fish out evidence. According to Mr. Bhattacharya, when there was no existence of a shop room, the question of local inspection in order to ascertain the local features of shop room in the scheduled premises, was contrary to the provisions of law and also beyond the scope of the suit.

Mr. Bhattacharya further submits that in the written statement, such plea was never taken by the opposite party.

Perused the record.

It appears that this is a case of pre-emption on the ground of co-sharership. The fact that the opposite party is a stranger purchaser is not in dispute. Paragraph 10 of the plaint indicates that

the stranger purchaser/opposite party went to take forceful possession of the property in question.

On the contrary, in the written statement it has been inter alia stated that the opposite party was in possession of the property in question and had made certain structures surrounded by a boundary wall. In order to repair and protect the dilapidated structure as also the boundary wall, the commission was necessary.

Hence, this court is of the view that the pre-emption case would not be affected, if the commission is allowed in order to ascertain whether the structure on the property requires any repair or not and such ascertainment could only be done by the advocate commissioner, who would file the report on the condition of the structures and the boundary wall.

Under such circumstances, commission/local inspection will be allowed, as per direction of the learned court below, on the following points:

- a) whether the existing structures in the suit property were damaged;
- b) whether such damages affected the user of the structures;
- c) whether the damage could be repaired by replacement of the tin structures with pucca construction

d) whether the boundary wall around the suit property was also damaged and required repair in order to make the suit property habitable.

Accordingly, the revisional application is disposed of and the order of the learned court below dated November 9, 2022 is modified to the above extent. The remaining portion of the order remain intact. The report shall be filed by the learned Advocate Commissioner within a month from the date of communication of this order.

All the parties are directed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)