

Ct. 27.07
No. 652
2023
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C.O. 4342 of 2019
Nur Nehar Begum & Anr.
-Versus-
Choudhury Gola Ambia & Ors.

Mr. Mukteswar Maity
Md. Hasanuz Zaman
Md. Zeeshanuz Zaman
Ms. Nupur Chaudhuri **...For the Petitioner**

Mr. Tirthankar Dhali **...For the opposite parties**

This is an application under Article 227 of the Constitution of India against order No. 64 dated 16th November, 2019 passed by the learned Civil Judge (Junior Division), 1st Court, Purba Bardhaman, in Title Suit No. 2 of 2013. By the impugned order learned Court below has rejected the plaintiff's prayer for local investigation commission under Order XXVI, Rule 9 of the Code of Civil Procedure.

Petitioners contended that the plaintiffs / petitioners herein filed aforesaid suit for declaration and permanent injunction in respect of the 'A' and "A-1" schedule property. According to plaintiffs / petitioners they are the rightful owners of the schedule mentioned 'A' and "A-1" property which they have acquired by way of registered Hebanama deed dated 08.07.1978 and since 1978 the plaintiffs are in khas possession of both 'A' and "A-1" schedule mentioned property to the plaint. Plaintiffs alleged that defendants are politically influenced persons and taking advantage of their political force, have encroached some portions of the 'A'(1)' schedule property and started unauthorised construction over the 'A' and "A-1" schedule property.

Petitioners further submit that earlier the plaintiffs /

petitioners filed an application under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure and another application for local inspection commission under Order XXXIX, Rule 7 of the Code of Civil Procedure.

Pursuant to the order passed in connection with local inspection commission, Advocate Commissioner has submitted a report and it appears from his report that the defendants forcefully encroached some portion of 'A' and "A-1" schedule property. After coming to know, plaintiffs / petitioners filed an application for amendment of plaint for incorporating the prayer for recovery of khas possession, which has been allowed.

Mr. Mukteswar Maity, learned Counsel appearing on behalf of the petitioners submits that though an inspection commission have been done, in respect of the suit property in order to bring topography of the property in question but in order to elucidate the matter in dispute i.e. plaintiffs case of encroachment in the schedule mentioned property and to indicate the actual portion encroached by the defendants, local investigation commission is needed, otherwise it will not be possible for the plaintiffs to prove the case of encroachment.

Mr. Tirthankar Dhali, learned Counsel appearing on behalf of the opposite parties raised vehement objection contending that local inspection commissioner has clearly noted about the encroachment in respect of the suit property and he has already submitted report in terms of the prayer of the plaintiffs and as such further local investigation commission is uncalled for in the present facts and circumstances of the case and/or for adjudication of the real dispute between the parties.

Learned Counsel for the opposite parties further submits that a process of mediation is going on between the parties. But the learned Counsel appearing on behalf of the petitioners submits that no such mediation process is pending nor any such prayer for mediation has been sought for by the parties.

I have heard learned Counsel appearing on behalf of both the parties. On perusal of the order impugned, it appears that the learned Court below has held that the local inspection commission report has exhaustively covered the issue and the said report submitted by the local inspection commissioner has extensively dealt with the encroachment issue in its said report. He further observed that the local inspection commission was held in the year 2013 and due to long lapse of time the prayer for local inspection commission cannot be allowed.

I have gone through the plaint filed in the Title suit No. 2 of 2013 wherefrom it appears that the plaintiffs originally had prayed for permanent injunction restraining the defendants from encroaching and raising any illegally/unauthorised construction over the plaintiffs 'A' and "A-1" schedule property, but plaintiffs on the basis of gathering knowledge about encroachment they have sought for recovery of possession in respect of encroached portion.

Plaintiffs have also described as 'A' and "A-1" schedule property in the plaint. In their petition for local investigation commission, plaintiffs have also prayed for ascertainment by way of investigation commission as to whether "A-1" schedule property is the part and parcel of the 'A' schedule property or not and whether any permanent

pucca structures, boundary wall or any nature of pucca constructions exists and/or standing over the 'A(1)' schedule property or not.

The term used in Rule 9 "elucidating any matter in dispute" gives wide discretion to court to make lucid any matter in controversy including the issue of encroachment. Since it is not possible for the parties to prove or to disprove the case of encroachment by producing desired evidence, the court needs assistance to get the desired evidence by way of investigation commission report, though such evidence is not binding upon court and the other side can countermand such evidence of commissioner's report by giving any other evidence but local inspection report by no stretch of imagination serve the said purpose. Thus the observation of court below that local inspection commissioner has extensively and exhaustive dealt with encroachment issue, so further local investigation commission is not required, is clearly a perverse finding, since the object of local investigation is to localization with reference to the plaintiffs document of title which cannot be done by way of local inspection commission. Since averment in the pleading raises a dispute with regard to the identity of the "Ka" & "Ka-1" schedule property, plaintiffs rightly resorted to appointment of survey commissioner under order XXVI, Rule 9 of the Code. Accordingly to find out truthfulness of plaintiffs' allegation about encroachment of plaintiffs' land by the construction allegedly put by the opposite parties, it is necessary to issue a commission upon relayment of plaintiffs deed. In such view of the matter the order impugned is not sustainable having not based upon legal reasoning. A local inspection commission was conducted earlier is no ground for rejection of the plaintiffs' prayer for

local investigation commission as the purpose and object of said two commissions are completely different.

In view of the above, C.O. 4342 of 2019 is allowed. The order impugned dated 16th November, 2019 is hereby set aside. Learned Court below is directed to appoint a survey knowing commissioner in terms of the plaintiffs' application under Order XXVI, Rule 9 of the Code of Civil Procedure within a period of three weeks from the date of communication of this order.

The name of the investigation commissioner and the initial fees of the commissioner shall be determined by the Court below and the investigation commission shall be conducted at the cost of the plaintiffs, upon serving notice upon both the parties. The investigation commissioner shall be directed to conclude the investigation in terms of points mentioned in petition and to submit a report before the learned Court below preferably within a period of eight weeks from the date of his appointment.

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.)