

10-04-2023
Court No.2
Sh/4.

**In The High Court At Calcutta
Jalpaiguri Circuit Bench**

C.O. 7 OF 2023

**Anima Khatoon.
Vs.
Halima Khatoon.**

Mrs. Suman Sehanabis (Mandal),
Mr. Alok Sah.

..For the Petitioner.

Mr.Jagrati Mishra,
Mr. Debayan Goswami,
Mr. Subham Gupta,
Mr. Keshab Kumar,
Mr. Raj Kumar Mitra.

For the Respondent.

Affidavit-of-service filed in Court today, is taken on record.

This is an filed under Article 227 of the Constitution of India.

From the endorsement made by the Registry it appeared that no caveat was lodged.

Ms. Suman Sehanabis (Mandal), learned counsel appeared for the petitioner.

Mr. Jagrati Mishra, learned counsel appeared for the Opposite Party.

The revisional application was considered previously by a Co-ordinate Bench on February 1, 2023 where an order of restrain was passed on the operation of the impugned order dated November 15, 2022, which was a limited interim order.

The relief claimed in the plaint filed by the petitioner/plaintiff in **Title Suit No.53/ 2017, at page 13 to this revisional application** were for

decree for declaration in favour of the plaintiff in respect of the right title and interest of the suit property and also decree for declaration seeking cancellation of an alleged deed of gift registered on September 15, 2017 (in short, the said gift deed).

The defendant/opposite party had filed its written statement, page 22 to the said revisional application. The defendant raised several rival claims including that the defendant was in possession of the suit property with a valid right title and interest and the plaintiff was the encroacher of the land after the death of the donor of the suit property. The donor being the husband of the plaintiff claimed to have gifted the suit property in favour of the defendant/opposite party, the sister of the donor.

On the basis of an application filed by the defendant/opposite party under **Order XXVI Rule 9 of the Code of Civil Procedure, 1908**, the defendant prayed for measurement of the suit property with its boundary, for ascertainment of the actual physical possession at the suit property and whether there is any residential structure of the suit plot. The impugned order was passed directing to measure the suit property, to ascertain the actual physical possession of the suit property and to ascertain whether there is any residential structure at the suit property and who is owning and possessing the suit property.

For such purpose a Commissioner was appointed who was directed to carry out the direction of the Learned Trial Court.

Challenging the said impugned order Ms. Suman Sehanabis (Mandal), learned counsel appearing for the

petitioner submitted that, from the reliefs claimed in the plaint and from the defence taken in the written statement of the respective parties in the pending suit being Title Suit No.53 of 2017, the Court ought not to have passed the said impugned order, as the defendant in whose application the said order was passed had no right to apply seeking such relief under the provision of **Order XXVI Rule 9 of the Code of Civil Procedure, 1908.**

The claims of the plaintiff in the plaint were such that if the plaintiff could not prove his claim, automatically the suit would fail for which the defendant could not have taken the plea for appointment of a Commissioner on the suit property seeking to carry out certain physical enquiry on the suit property as directed in the impugned order. She submitted that, the impugned order being wholly without jurisdiction is liable to be set aside.

Mr. Jagrati Mishra, learned counsel, appearing for the defendant/opposite party submitted that, to come to a conclusion on the reliefs claimed by the plaintiff, it was really necessary to ascertain the measurement and boundaries of the suit land, to ascertain as to who is in actual possession of the suit land and whether any residential structure is there on the suit land. By filing the said application the defendant had assisted the Court to pass such order which was otherwise required for complete adjudication of the suit.

Mr. Mishra, further referred to an order dated December 3, 2022 passed in a proceeding being Civil Revision No.4 of 2022 by the learned Court of the District Judge, Coochbehar, page 66 to this revisional

application and submitted that, the identical claim of the petitioner in this revisional application was already dismissed by the Learned District Judge, Coochbehar in the said revisional proceeding under Section 115 of the Code.

After considering the rival contentions raised on behalf of the appearing parties and upon perusal of the materials on record, at the threshold it appeared to this Court that, the revisional application being Civil Revision No.4 of 2022 was dismissed by the learned District Judge, Coochbehar merely on the point of maintainability that the revision would not lie under Section 115 of the Code. This order certainly would not stand in the way of filing the present application under Article 227 of the Constitution of India and in entertaining the same.

Considering the reliefs claimed in the plaint filed by the plaintiff/petitioner and considering the defense taken by the opposite party/defendant in its written statement, as already discussed above, this Court is of the view that, to prove its case in support of a declaration for right, title and interest, the plaintiff is to prove how it had acquired right, title and interest on the suit property and whether the same is existing or not. In case any dispute regarding measurement or ascertainment of physical status of the suit property or the status of the property qua the parties would arise before the Court, then the Civil Court in exercise of its power under **Order XXVI Rule 9 of the Code**, had its jurisdiction to ascertain this issue by appointment of a Commissioner by causing a local investigation. The Court, otherwise, is not vested with the jurisdiction to cause any roving and fishing enquiry.

In course of the trial if the Court is of the view that a local investigation is required to be made, it has jurisdiction to appoint a Commissioner for the same. But the Court did not do so. The impugned order was passed at the instance of the defendant.

In exercise of power under Article 227 of the Constitution of India, the first and foremost duty of the Court is to scrutinize the impugned order and to come to a conclusion whether any jurisdictional or procedural infirmity is apparent on the face of the record and/or on the impugned order.

On the basis of the above settled principle of law, on a scrutiny of the said impugned order, this Court is of the firm view that, the impugned order was passed with an erroneous exercise of the jurisdiction of the Learned Trial Court at the instance of the defendant. If the order was passed in exercise of power under **Order XXVI Rule 9 of the Code**, Court should have passed such an order on its own motion. There was no such finding in the said impugned order that the Court was required to pass such an order on its own motion. No reason had been ascribed in the impugned order, which really had prompted the learned Trial Court to pass the impugned order.

For all those reasons, the said impugned order dated **November 15, 2022** had suffered from jurisdictional error and procedural infirmity. The said impugned order dated **November 15, 2022** stands **set aside and quashed**. Consequentially, the application filed by the defendant under **Order XXVI Rule 9 of the Code**, under which the said impugned order passed stands dismissed.

However, this order shall not preclude the learned Trial Court to proceed on its own motion strictly in accordance with law, if it finds any requirement for appointment of a Commissioner on the suit plot to arrive at a right conclusion at the trial of the pending civil suit being Title Suit No.53 of 2017.

The learned Trial Court is requested to expedite and complete the procedure for hearing of the suit and come to its logical conclusion as expeditiously as possible without granting any unnecessary adjournments to the parties and preferably within a period of one year from the date of communication of this order.

It is made clear that, this Court has not gone into the merits of the claims and rival claims of the parties in the Title Suit and the parties shall be at liberty to argue on their respective points at the time of trial of the suit.

The Learned Trial Court shall not be influenced by any observation made herein and shall conclude the trial of the suit in accordance with law.

In view of the above, this **revisional application, C.O.7 of 2023 stands allowed**, without any order as to costs.

(ANIRUDDHA ROY, J.)