

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.602 of 2022

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Dinesh Sah, Son of Late Nand Kishore Sah, Resident of Village- Chakbhikahn @ Shahi Khan Nawada, Tole - Sadarganj, P.O. -Chak Nawada, P.S. -Dalsinh- Sarai, District- Samastipur, Presently residing at Degi Gram Kora Para Neamatpur, P.S. - Kulti, District- Bardhaman, State- West Bengal.

... .. Petitioner/s

Versus

1. Ram Baran Rai, Son of Late Lakhan Rai, Resident of Village- Keota, P.O. - Keota, P.S. - Dalsingsarai, District- Samastipur.
2. Ram Balak Rai, Son of Late Lakhan Rai, Resident of Village- Keota, P.O. - Keota, P.S. - Dalsingsarai, District- Samastipur.
3. Parshuram Gupta, son of Late Nand Kishore Sah, Resident of Village- Nawada, P.S. - Dalsingsarai, District- Samastipur.
4. Nishant Kumar, son of Late Mrigendra Sah, Resident of Village - Nawada Tole, Sardarganj, P.O. - Chak Nawada, P.S. -Dalsingsarai, Sub-Division- Dalsingsarai, District- Samastipur.
5. Niraj Kumar, son of Late Mrigendra Sah, Resident of Village - Nawada Tole, Sardarganj, P.O. - Chak Nawada, P.S. -Dalsingsarai, Sub-Division- Dalsingsarai, District- Samastipur.
6. Prashant Kumar, son of Late Mrigendra Sah, Resident of Village - Nawada Tole, Sardarganj, P.O. - Chak Nawada, P.S. -Dalsingsarai, Sub-Division- Dalsingsarai, District- Samastipur.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Alok Kumar Sinha, Advocate
For the Respondent/s	:	Mr. Ram Pravesh Sharma, Advocate Ms. Madhuri Kumari, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 30-07-2024

The instant petition has been filed by the plaintiff/petitioner under Article 227 of the Constitution of India against the order dated 24.03.2022 passed by the learned Sub Judge-1st, Dalsingsarai in Title Suit No. 36 of 2014 whereby and whereunder the learned Sub Judge-1st, Dalsingsarai rejected the petitions dated 29.01.2015 and 26.06.2015 filed by the



plaintiff/petitioner for appointment of Survey Knowing Pleader Commissioner.

2. Briefly stated, the facts of the case, are that the petitioner is the plaintiff before the learned trial court and has filed Title Suit No. 36 of 2014 seeking following reliefs:-

“(i) On consideration of the facts and the circumstances the court be pleased to hold and declare that the southern boundary as “Ram Yad Sah and Subalal Sah” wrongly mentioned in place of “Road” and eastern boundary also wrongly mentioned as “Mokir Alah” in place of “Name Mokir” in all three sale-deeds no. 8836, 8837 and 8838 dated 10-1-1979 executed by Nand Kishor Sah in favour of Lakhan Rai.

(ii) The court be pleased to appoint the survey knowing Pleader Commissioner for measurement and demarcation of Schedule-III and Schedule-IV of the plaint which are part of Schedule-II land of the plaint.

(iii) The Court be pleased to pass the Decree for recovery of possession in respect to the part area of Schedule-IV land of the plaint from west, if found encroached.

(iv) The Court be pleased to grant the decree for cost.

(v) The Court be pleased to grant any other relief or reliefs for which the plaintiff be found deemed entitled.”

3. The plaintiff/petitioner claims himself to be the



bona fide owner of Schedule-II land of the plaint and he is coming into possession of the same. The father of the plaintiff/petitioner, namely, Nand Kishore Sah sold part of the land having an area of 4 *katha* 5 *dhur* out of 5 *katha* land of the Schedule-II of the plaint from west by executing three registered sale deed nos. 8836, 8837, 8838 dated 10.10.1979 in favour of Lakhan Rai which has been detailed and described in Schedule-III of the plaint and kept remaining 15 *dhur* land from east for his own use and its details have been mentioned in Schedule-IV of the plaint. But in all the said three sale deeds, by mistake of deed writer, in southern boundary it has wrongly been mentioned as 'Ram Yad Sah' and 'Subalal Sah' in place of 'road' and eastern boundary has been wrongly mentioned as 'Mokir Alah' in place of 'Name Mokir'. The said land is situated at Mouza Chak Bhikhan @ Shahi Khan Nawada, Thana No. 80, Anchal+P.S.-Dalsinghsarai, Dist.-Samastipur having area 5 *katha* in Schedule-II of the plaint, 4 *katha* 5 *dhur* in Schedule-III of the plaint and 15 *dhur* in Schedule-IV of the plaint (Schedule-III and Schedule-IV land are part of Schedule-II land of the plaint) *Khata* No. 386/367, *Khesra* Nos. 970, 971, 972 (old), 960 and 961(new). The respondents 1st set, sons of Lakhan Rai, are defendants along with respondent 2nd set who



are son and grandsons of Nand Kishore Sah. The respondent 1st set have been enjoying their 4 *katha* 5 *dhur* purchased land of the sale deed. The remaining 15 *dhur* of Schedule-II land of the plaint from east has been continuously enjoyed by the sons and grandsons of Nand Kishore Sah. It further appears from the petition that the petitioner along with his family members reside at Kolkata and respondent 1st set, in absence of the petitioner, constructed illegal structure over part area of Schedule-IV of the plaint in collusion with respondent 2nd set in December, 2013. When the petitioner requested the respondent 1st set for removal of illegal structure, they did not pay any heed and thereafter, the petitioner came to know about wrong mentioning of boundary in the sale deeds dated 10.10.1979. Since the respondent 1st set refused to remove the structures, the petitioner instituted the Title Suit No. 36 of 2014 on 04.03.2014. The defendants/respondent 1st set appeared and filed their written statement on 31.07.2014 stating therein that Nand Kishore Sah along with his minor sons, vide a registered sale deed dated 29.08.1975, sold Lakhan Rai an area of 14 *dhur* of Khata No. 20 and Survey Plot No. 1042 (old) 911 (new) and 1 *dhur* of Survey Plot No. 1036 thus total area of 15 *dhur* which are adjacent to other Survey Plot Nos. 970, 971 and 972(old). The



defendants/respondent 1st set also stated about execution of three sale deeds for area of 4 *katha* 5 *dhur* of Khata No. 386, 367 and Old Survey Plot Nos. 970, 971 and 972 and New Survey Plot Nos. 960 and 961. The defendants/respondent 1st set thus claimed that they have been coming in peaceful possession over the purchased land of 5 *katha* at the spot. During pendency of the suit, the petitioner filed a petition dated 29.01.2015 and a supplementary petition dated 20.06.2015 under Order 26 Rule 9 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for appointment of survey knowing Pleader Commission in the court of learned Sub Judge-I, Dalsingsarai making a prayer for measurement of the land of Survey Plot Nos. 970, 971 and 972 and also for direction to the learned Survey Knowing Pleader Commissioner to report whether defendants 1st party is in possession over their area of 4 *katha* 5 *dhur* of Survey Plot Nos. 970, 971 and 972 and the physical feature of remaining area of Survey Plot Nos. 970, 971 and 972. The defendant 1st party filed a rejoinder dated 20.03.2015 which was not pressed and subsequently another rejoinder dated 02.01.2017 was filed in the court of learned Sub Judge-1st, Dalsingsarai. In the rejoinder, the defendants/respondent 1st set called for a report of learned Advocate Commissioner regarding



area of Kheshra Nos. 965 and 968 while claiming that land having area of 5 *katha* of Kheshra Nos. 970, 971 and 972 is not in possession of the petitioner. The learned trial court after hearing both the parties, dismissed the applications dated 29.01.2015 and 26.06.2015 filed by the plaintiff/petitioner which has been challenged in the present petition.

4. Learned counsel for the plaintiff/petitioner submitted that the impugned order is not sustainable as the same has been passed without consideration of the facts of the case and is erroneous. The plaintiff/petitioner claims that the defendants/respondents 1st set forcibly captured 15 *dhur* of his land and it is a question of encroachment. The learned trial court should have considered this fact that ascertainment of encroachment and demarcation of boundary is not possible without help of Survey Knowing Pleader Commissioner. Learned trial court has also not considered the fact that the defendants/respondents 1st set have changed their story in rejoinder filed to the application of the petitioner and stated therein that the 15 *dhur* land transferred by Nand Kishore Sah in favour of Lakhan Rai, the father of the respondent 1st set, was not in his share in *Takshinama* Deed and for this reason 15 *dhur* land from the land of the vendor having Khata No. 386/387 S.P.



Nos. 970, 971 and 972 was delivered to the father of the defendants/respondents 1st set in lieu of wrong Khata No. 20 Survey Plot Nos. 1042 and 1036 whereas they claimed in written statement that 15 *dhur* land of Khata No. 20 Survey Plot No. 1042 (old), 911 (new) and Survey Plot No. 1036 adjacent to Survey Plot Nos. 970, 971 and 972 (old) was transferred to the father of the defendants/respondents 1st set. However, in their counter affidavit, the respondents claimed that 15 *dhur* of land of Plot Nos. 970, 971 and 972 was acquired by the National Highway Authority of India. Thus, the learned counsel submitted that the area of land mentioned in Schedule-IV of the plaint has never been sold to the father of the respondent 1st set who encroached upon the said land. Learned counsel reiterated that as it is a case of encroachment and the demarcation of boundary, it was just and proper that a Survey Knowing Pleader Commissioner be appointed for the said purpose. In support of his contention the learned counsel for the petitioner relied on the decision of a Co-ordinate Bench of this Court in the case of ***Ram Sanjiwan Chaudhary Vs. Arun Kumar Rai & Ors., (Civil Misc. No. 1374 of 2018)*** where in a dispute between the parties with regard to a road in the plot bought by the parties together and defendants creating hindrance in using the said road, the



Co-ordinate Bench allowed the petition filed under Order 26 Rule 9 of the Code and quash the order of the learned trial court. The Co-ordinate Bench relied on the decision referred by the learned counsel for the petitioner of the Hon'ble Supreme Court in the case of *Haryana Waqf Board Vs. Shanti Sarup & Ors.* reported in *(2008) 8 SCC 671* wherein it has been held that when controversy between the parties was with regard to demarcation of the suit land, it was appropriate for the court to direct the investigation by appointing local Commissioner under Order 26 Rule 9 of the Code. Thus, the learned counsel submitted that the impugned order be set aside and the petition of the petitioner be allowed.

5. On the other hand, learned counsel appearing on behalf of the respondents vehemently contended that there is no infirmity in the impugned order and the same needs to be sustained. Learned counsel further submitted that the entire area of Plot Nos. 970, 971 and 972 apart from 960 and 961 was sold by Nand Kishore Sah vide three registered deeds of sale in favour of Lakhan Rai, father of the respondents 1st set. 15 *dhur* of land of Plot Nos. 960 and 961 was acquired by National Highway Authority of India and no area was left with the family of Nand Kishore Sah on the aforesaid plots. Therefore, no land



in the aforementioned five plots remained with the father of the plaintiff. Therefore, no question arises for appointment of Survey Knowing Pleader Commissioner. Learned counsel further submitted that there was no need for appointment of Survey Knowing Pleader Commissioner to demarcate the land mentioned in Schedule-IV because no land has been left in the share of the plaintiff and there is only 4 *katha* and 5 *dhur* of land which has already been sold to the father of the respondents and they are in its possession. For this reason, the suit filed by the plaintiff for declaring new boundary of the land is wrong and even barred by limitation. Learned counsel further submitted that the plaintiff/petitioner wants to gather evidence by appointment of Survey Knowing Pleader Commissioner and it is not the duty of the court to collect evidence on behalf of any party. Learned counsel referred to the decision of a Co-ordinate Bench of this Court in the case of *Asraf Ansari Vs. Jitendra Prasad* reported in (2023) 4 PLJR 302, paragraph no.10 of this judgment reads as under:-

“10. In Padam Sen and Another Vs. The State of U.P. reported in AIR 1961 SC 218, the three Judge Bench of the Hon'ble Supreme Court has held that it is not the business of the Court to collect evidence in favour of one party. In a matter related to investigation into the disputed question of fact of possession, the power of appointment of Commission for local investigation cannot be exercised by the Court to assist the party to collect the evidence, where the party can collect the



evidence himself.”

The learned counsel for the respondent further referred to the decision of a Co-ordinate Bench of this Court in the case of ***Subhash Prasad Vs. Iftekhar Ahmad @ Munna Tyagi & Ors.*** reported in ***(2019) 1 PLJR 988*** paragraph nos. 9 and 10 of this judgment read as under:-

“9. Since the main issue in the instant case is relating to right, title and possession of the petitioner over the suit land, the court below has rightly held that there is no requirement for appointment of any commission for scientific investigation. It is well settled position in law that a commission cannot be appointed for the purpose of collecting evidence on behalf of the parties.

10. The scope of jurisdiction under Article 227 of the Constitution is restricted. It has to be exercised sparingly and in appropriate cases in order to keep the subordinate courts within the bounds of their authority.”

Thus, the learned counsel submitted that there is no merit in the present civil miscellaneous petition filed by the petitioner and the same be dismissed.

6. I have given my thoughtful consideration to the rival submission of the parties in the background of facts and circumstances of the case. Evidently the case has been filed seeking correction in the boundary in the sale deeds executed by the father of the petitioner in favour of father of the respondents 1st set. Thereafter, relief of appointment of Survey Knowing Pleader Commissioner for measurement and demarcation of



Schedule-III and Schedule-IV land of the plaintiff has been sought apart from a decree for recovery of possession in respect of part area of Schedule-IV land of the plaintiff if the same was found encroached. From the discussion of relief claimed by the plaintiff/petitioner it could not be said that it is a simple case of encroachment. Though the respondents 1st set has taken varying stances with regard to the 15 *dhur* land as claimed by the plaintiff/petitioner, the same is not material for deciding the application filed under Order 26 Rule 10 by the plaintiff/petitioner. When the dispute is with regard to boundary, that too, is the registered sale deeds dated 10.01.1979, any claim against incorrect boundary unless proved could not be given much credence. The duty is cast upon the plaintiff to prove his claim by adducing cogent evidence. There could not be any presumption in favour of the plaintiff on this account. Moreover, in a disputed question of fact like wrong boundary and its correction, the court could not order for appointment of Survey Knowing Pleader Commissioner as Commissioner could not be appointed to collect evidence on behalf of the parties. It is also a relevant factor to be considered that one of the reliefs sought by the plaintiff/petitioner is with regard to appointment of Survey Knowing Pleader Commissioner for measurement and



demarcation of Schedule-III and Schedule-IV land of the plaintiff. If such a final relief has been claimed in the plaint, the same could be granted only after the parties have led their evidence and the plaintiff proves his case and not prior to that especially at this stage. It is also the settled law that final relief could not be granted by way of interim relief [*State of U.P. & Ors. Vs. Ram Sukhi Devi* reported in (2005) 9 SCC 733].

7. It is trite to reiterate that the power of superintendence under Article 227 of the Constitution has been bestowed upon the High Courts to keep the subordinate courts within the bounds of their authority and to see that they do not exceed their jurisdiction and do not pass any orders in error of their jurisdiction. So this power is to be exercised sparingly.

8. Having regard to the discussion made hereinbefore, the facts do not disclose any error of jurisdiction and hence, I do not think the learned trial court committed any illegality and irregularity while passing the impugned order. When there is dispute over boundary and possession over the suit land, there could not be any role of Survey Knowing Pleader Commissioner at this stage as the same would amount to collecting evidence by the court on behalf of the parties which is not permissible. Therefore, the impugned order dated



24.03.2022 passed by the learned Sub-Judge-Ist, Dalsingsarai in Title Suit No. 36 of 2014 does not suffer from any infirmity and the same is affirmed.

9. As a result, the instant civil miscellaneous petition stands dismissed.

(Arun Kumar Jha, J)

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AFR/NAFR	AFR
CAV DATE	04.07.2024
Uploading Date	30.07.2024
Transmission Date	NA

