

Ct. 31.01
No. 652 2024
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C.O. 1799 of 2021
Pallab Chatterjee
-Versus-
Prasanta Pal & Ors.

Mr. Partha Pratim Roy
Mr. Sarbananda Sanyal **...For the Petitioner**

Learned Counsel appearing on behalf of the petitioner undertakes to file affidavit-of-service in course of the day.

Opposite parties are not represented.

Order dated 2nd November, 2019 passed by the learned Civil Judge (Junior Division), 1st Court at Baruipur, South 24-Parganas, in Title Suit No. 7 of 2009, is under challenge in the present application under Article 227 of the Constitution of India.

Petitioner contended that plaintiff opposite party No. 1 herein in the aforesaid suit claimed ownership in the suit property and further contended that the defendants having no right, title or interest in the suit property are trying to take forcible possession of the suit property by evicting the plaintiff therefrom. Defendants appeared in the said suit and filed written statement denying all material allegations.

Thereafter, by way of amended plaint plaintiff contended that during pendency of the suit, defendants in violation of the order of injunction, on 5th March, 2009 illegally encroached western portion of the suit property

measuring 60 ft. X 4 ft., which is more or less 250 sq.ft., and they have already constructed a brick-built boundary wall therein. Accordingly, the plaintiff has also prayed for recovery of possession in the plaint in respect of the allegedly encroached '*kha*' schedule property situates within '*ka*' schedule to the plaint.

In order to ascertain the plaintiff's aforesaid case of encroachment which however has been denied by the defendants, plaintiff/opposite party No. 1 filed an application under Order XXVI, Rule 9 of the Code of Civil Procedure for making local investigation commission of the suit property.

It is submitted by the petitioner that the learned Court below by the order impugned allowed the prayer for local investigation commission but requested the learned Civil Judge, (Senior Division), to suggest a name of survey passed investigation commissioner going beyond the judicial decorum and also jurisdiction of the Court.

Mr. Partha Pratim Roy, learned Counsel appearing on behalf of the petitioner further submits that the Trial Court illegally allowed the said application for investigation Commission on the ground that the plaintiff has made out a case of encroachment without considering the fact that the application has been filed for fishing out evidence.

He further submits that learned Court below instead of requesting the higher Court for suggesting a name of local investigation commissioner, he should have appointed an engineer commissioner for holding local investigation commission to ascertain the age of the construction.

I have considered the submission made on behalf of the petitioner. Since, the plaintiff has made out a case of encroachment in the plaint and the defendants have denied the same, in order to adjudicate the real controversy between the parties, it appears that local investigation commission is required in the present context and as such the portion of the order by which Court below allowed local investigation commission does not call for interference by this Court.

However, this Court is of the view that the Court below was not justified in requesting a higher Court to suggest a name who can be appointed as local investigation commissioner. He should have maintained a panel of commissioners.

In such view of the matter, C.O. 1799 of 2021 is hereby disposed of with a direction upon the Court below to appoint an Engineer Commissioner to make the local investigation commission and to submit report in terms of schedule of points for local investigation commission as

mentioned in the said petition.

Since, the petitioner herein has also disputed the age of the construction of the boundary wall, the Court below is further directed to ask the local investigation commission to submit also a report, if possible, about approximate age of the construction of the boundary wall, allegedly raised by the petitioners/defendants in the alleged encroached portion as “local feature”.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)