

06.05.2024
Sl. No.14(ML)
srm

C.O. No. 2393 of 2023
Sri Naresh Kumar Yadav
Versus
M/s. Shree Raj Enterprise & Ors.

Mr. Asit Baran Routh,
Mr. Goutam Das

...for the Petitioner.

Mr. Tarak Nath Halder

...for the Opposite Party Nos.1 to 3.

1. At this stage, this Court does not find any necessity to interfere with the order impugned.
2. By the order dated June 5, 2023, the learned Civil Judge (Senior Division) at Sealdah, dismissed an application for local investigation filed under Order XXVI Rule 9 of the Code of Civil Procedure filed in connection with Title Suit No.130 of 2018. The learned Court was of the view that the application for appointment of the engineer commissioner could not be allowed at the relevant stage. Upon recording the submissions made on behalf of the parties, the court was of the specific opinion that the stage had not arrived which would require appointment of an engineer commissioner.

3. While the plaintiff/petitioner contended that an investigation was necessary in order to ascertain whether there was any sale or handing over possession to any third party or whether any illegal construction was going on, the defendants denied all allegations and submitted that the order of *status quo* with regard to the possession of the property had been granted and the defendants had not violated such order. Moreover, an application for violation of the order of ad interim injunction under Order XXXIX Rule 2A of the Code of Civil Procedure was already pending before the learned court, which was to be decided. The specific contention of the defendant was that no illegal construction was going on. The plaintiff No.1 had lodged a complaint before the Kolkata Municipal Corporation prior to the filing of the suit, but the corporation, upon inspection, did not find any illegal construction.

4. The application for appointment of engineer commissioner for holding the local investigation is perused by this Court. The pleadings are as follows:

“2. That the plaintiff states that based on the prayer of the plaintiff the Ld. Court was pleased to pass an of injunction vide order no.2 dated 29.9.2018 directing the defendants not to hand over the possession of the ‘A’ schedule property to any third

party before handing over the possession to the plaintiffs.

3. That the defendants in utter violation of the said order, already handed over the possession to the third party namely (1) AMIT KUMAR SINGH (2) RAM BABU ROY and (3) SANJAY GUPTA and further the defendants trying to hand over the possession of the remaining flat to the other parties.

4. That the defendants violating the Sanction Plan have made construction in the Court Premises and even some construction remain unfinished condition."

5. The points for investigation are as follows:

"1. To go to the locale at Premises No.12/1/1A/16, Beliaghata Road, Police Station – Entally, Post Office – Tangra, Kolkata – 700015, Ward No.57, within the limit of Kolkata Municipal Corporation, District – South 24-Parganas and to ascertain with the help of the Building Sanction Plan of K.M.C. of this Premise. Whether building has been constructed accordingly.

2. To ascertain whether the entire building has been constructed or not and if the construction is not completed, the Commissioner shall take note the particulars of unfinished construction.

3. To see and take note how many flats, shop and car parking spaces and/or accommodation available thereon in the suit building from Ground floor to Top floor.

4. To note the name and address of the present occupation and their respective possession.

5. To draw sketch map showing the accommodation of the suit building from Ground floor to Top floor."

6. This is a suit for specific performance of a contract. The

first prayer is for a decree of specific performance in

terms of the development agreement dated November 20,

2015 with a further prayer to direct the defendant to carry

out the construction work in terms of the said agreement.

The second prayer is for permanent injunction restraining the defendants from creating any third party interest and from carrying out any construction in deviation of the plan. An ad interim order of injunction has already been granted by the learned court on September 27, 2018 on the prayer of the plaintiffs. The plaintiffs and the defendants were directed to maintain *status quo* as regards possession of the property.

7. On the allegation of violation of the order of ad interim injunction, a proceeding has been taken out under Order XXXIX Rule 2A of the Code of Civil Procedure, which is pending before the learned court and it is informed that the said application is at the stage of recording of evidence.
8. In the suit for specific performance of a contract and for direction upon the developers to construct in terms of such contract, with further prayer of permanent injunction restraining the defendants from creating third party rights, a local investigation on the points quoted above, is not necessary. The written objection of the defendants discloses that prior to filing of the suit a complaint was lodged with the corporation, but the

corporation did not find any deviation from the sanction plan at the relevant stage.

9. In such a suit, an application under Order XXVI Rule 9 of the Code of Civil Procedure cannot be allowed at the very nascent stage. The pleadings, which have been quoted hereinabove, do not mention the nature of violation or the extent of violation. Only by vaguely mentioning that there is a violation of the sanction plan, a local investigation cannot be allowed. Local investigation is allowed under situations when court deems that such investigation would be required for elucidation of any matter in dispute.
10. Going by the points for investigation, which have been quoted above, whether the building had been construction properly, whether the construction was complete, the number of flats and car parking spaces constructed and the local features of the property, are not relevant. This Court also holds that the stage was not appropriate for the petitioner to come up with such application. Sketch map of the ground floor and top floor, names and addresses of the occupants and what was the extent of occupancy are hardly relevant for the proceeding to continue as a suit for specific performance

of a contract. The prayer for restrain upon the defendants to create such third party interest has already been taken care of in the order of ad interim injunction.

11. The revisional application is, thus, dismissed.

12. There shall be no order as to costs.

13. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)