

14.05.2024
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Ct. no. 652
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CO 3712 of 2018

Md. Alfaz Uddin
Vs.
Sk. Yaqub Ali Molla & Ors.

Mr. Animesh Das	
Mr. Sk. Md. Ali	...for the Petitioner
Mr. Sk. Taslim Ali	...for the O.P. no. 2

The present petitioner as plaintiff filed a suit for mandatory injunction and recovery of possession against the defendant/opposite party before the court below being Title Suit no. 20 of 2013. The Defendant/opposite party no. 1 and 2 herein entered appearance in the aforesaid suit and filed written statement.

During pendency of the said suit, the plaintiff/petitioner herein filed an application under Order XXVI rule 9 of the Code of Civil Procedure, praying for appointment of a survey commissioner in order to ascertain the boundary of adjacent plots of the parties namely plot no. 125/1616 and plot no. 125/1602. Learned court below after hearing both the parties, was pleased to reject the said application for local investigation commission by the order impugned.

Being aggrieved by that order, Mr. Das, learned counsel for the petitioner submits that the court below while passing the order impugned, held that the local investigation commission in respect of the suit property is indispensable for proper adjudication of the matter as because, the extent of encroachment cannot be decided by oral evidence. However, at the operative part of the order, the court below has arbitrarily rejected the application, without showing any ground for such rejection. Accordingly, he has prayed for setting aside the order impugned.

Mr. Ali, learned counsel for the opposite party no. 2 raised strong objection contending that the order impugned suggests that earlier, the same plaintiff filed another application for local investigation commission under Order XXVI rule 9 of the Code, which was rejected on several grounds including the ground that all the co-sharers of plot no. 125/1616 have not been made party and in spite of that order, the plaintiff has not taken steps for impleading those persons as a party to the suit. He further submits that the defendants purchased 15 decimal of land out of 40 decimal in Plot no. 125/1602 and said plot has not been partitioned among co-sharers and as such without filing partition suit in respect of Plot no. 125/1602, it is not possible to ascertain position and location of the property of

the defendants and other co-sharers in plot no. 125/1602 and in the absence of other co-sharers, suit plot cannot be surveyed or relayed.

He further submits that plaintiff/petitioner has not prayed for recovery of possession and accordingly, the court below was justified in rejecting the application. The order impugned does not call for interference by this court invoking jurisdiction under Article 227 of the Constitution of India.

On perusal of the plaint of Title Suit no. 20 of 2013, it appears that the plaintiff has specifically alleged that defendant nos. 1 and 2 have illegally and forcibly dispossessed the plaintiff from his lawful possession in respect of 'ka' schedule property and started construction therein on and from 7.2.2013 and accordingly, the plaintiff has prayed for a declaration of 16 anus ownership in respect of 'ka' schedule and also for recovery of possession of the 'ka' schedule property from the defendants and also for injunction and other reliefs. Be it mentioned that "ka" schedule to the plaint is comprising of plot no. 125/1616 measuring 49 satak out of 60 satak which is adjacent to defendant's plot no. 125/1602.

While dealing with the said application for local investigation commission, learned court below held that it is an admitted position that plot no. 125/1616 belongs to the plaintiff and plot no.

125/1602 belongs to the defendant and both the plots are adjacent and are required to be surveyed and relayed. The court below also opined that since the dispute relates to encroachment, the local investigation commission is indispensable for proper adjudication of the matter as because the extent of encroachment cannot be decided by oral evidence.

In spite of that observation, the court below rejected the application for local investigation commission on the ground that schedule is not clear over which the commission is to be performed and the co-sharers of plot no. 125/1602 have not been made party and in their absence, survey and relayment of the property will not be in accordance with law.

Such finding of the court below is perverse in view of the fact that in the of schedule of commission work in the local investigation petition, petitioner herein stated which plots of land to be surveyed relaying with the mouja map. Moreover, on perusal of averments made in the plaint including the cause of action of the suit, it is quite clear that plaintiff has sought for relief against the persons/defendants who have allegedly encroached plaintiff's alleged land and he has not sought for making partition of any property, so that it can be said that during local investigation commission, presence of other co-sharers is required.

In such view of the matter, I find that the ultimate finding of the court below is not in conformity with the observation made by the court below in the body of the order and on certain erroneous considerations, he has rejected the prayer. Furthermore, it appears that for the adjudication of the real controversy between the parties in the suit, local investigation commission is required. Accordingly, ultimate finding of the court below is liable to be set aside.

C.O. 3712 of 2018 is thus allowed. The impugned order dated 17th August, 2018 passed by the learned Civil Judge (Junior Division), 2nd Court, Chandannagar, Hooghly in Title Suit no. 20 of 2013, is hereby set aside. The learned court below is directed to appoint a Local Investigation Commissioner within a period of three weeks from the date of communication of the order at the cost of the petitioner/plaintiff and to direct the Commissioner to submit a report in terms of points mentioned in the local investigation commission petition within a period of four weeks thereafter.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)