

13.02.2024
Court No. 19
Item No.24
Cp

C.O. No. 4437 of 2023

Bittu Shaw
Vs.
Shankar Shaw & Ors.

Mr. Shibaji Kumar Das
Mr. Dipendu Sarkar
.....for the petitioner.

Mr. Nayeemuddin Munshi
....for the opposite party
nos. 1 to 13.

1. The revisional application arises out of an order dated December 5, 2023, passed by the learned Civil Judge (Junior Division), 2nd Court at Barrackpore in Title Suit No. 289 of 2022. By the order impugned, the learned court rejected an application under Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure. The learned court was of the opinion that local investigation was not required in the facts pleaded in the plaint.
2. According to the learned court, the plaintiffs were trying to prove their case by collecting evidence through such local investigation. It was for the plaintiffs to prove their case with cogent evidence and relevant documents in relation to their right, title and interest in the suit property. In a suit for declaration and

injunction the plaintiffs should not be allowed to fish out evidence. The plaintiffs could not avoid the burden of proving their case of ownership and possession, by depending on a report to be filed by the commissioner upon local investigation.

3. Mr. Das, learned advocate appearing on behalf of the petitioner/plaintiff no. 1, submits that the order impugned suffers from the following irregularities:-

- a) There was an averment in the plaint that there was an encroachment.
- b) No denial of such allegation of encroachment appeared in the written statement. Thus the encroachment was admitted.
- c) The incidents which led to encroachment were clearly indicated in the plaint.
- d) The plaintiffs had the right to construct a boundary wall, but due to the resistance of the defendants, such boundary wall could not be constructed. Thus, local investigation should be allowed so that the plaintiffs' property could be demarcated.

4. Upon perusal of the plaint, this Court finds that there does not appear to be any boundary

dispute pleaded in the plaint. Paragraph 18 of the plaint only indicates that when the materials had been gathered for construction of the boundary wall, the defendants resisted such construction and assaulted the plaintiffs. The matter was also reported to the Commissioner of Police, Barrackpore. In paragraph 19(a) again, a similar averment has been made with regard to the objection, abuse and assault committed by the defendants when the plaintiffs wanted to construct their boundary wall on October 26, 2022. Accordingly, the plaintiffs filed the application for appointment of a survey passed commissioner, to bring on record whether there was any encroachment on any portion of the suit property.

5. The prayers in the plaint are for a decree of declaration that the plaintiffs are the absolute owners of the suit property with 16 annas share, declaration that the defendants did not have any right to disturb the possession and ownership of the plaintiffs and for permanent injunction. There is no prayer for recovery of possession from the defendants, of the alleged encroached portion. The suit is not about encroachment, as it has been framed. There

does not appear to be any boundary dispute, at present.

6. Under such circumstances, the learned court below did not act illegally or with material irregularity, in rejecting the application for local investigation.
7. Thus, the revisional application is disposed of without any interference with the order impugned. There shall be no order as to costs. Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)