

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Rai Chattopadhyay

C.O 110 of 2024

Ajoy Kumar Ghosh & Anr.

Vs.

Shyamal Das & Ors.

For the Petitioners : Mr. Subhasish Mishra,
: Mr. Satyajit Paul.

For the O.P. No. 1 : Ms. Suman Sehanabis (Mondal).

Heard on : 03/09/2024

Judgment on: 10/09/2024

RaiChattopadhyay,J.

1. Dispute between the parties has been culminated a title suit being TS No. 7 of 2021, now pending before the Civil Judge (Junior Division) Court at Cooch Behar district. The Court passes an order in the same , that is dated 6th May, 2024, which is under challenge in this revision. The said order is for rejecting petitioner's prayer, made before the Court under Order 26 Rule 9 of the Civil Procedure Code. The petitioner is the defendant in the said suit, whereas the opposite party No.1 is the plaintiff therein.
2. The petitioner say that he is the owner by way of purchase, of a piece of land measuring 2 Katha, 3/4 Dhur, comprised within Mouza - Sahar Cooch Behar, in R.S. Plot No. 10284 (part of L.R. Plot No. 13687) and municipal holding No. 53 comprised within ward No.-12. That, he has purchased the same vide a deed of conveyance dated 7th September, 1999 and since then he is the owner of absolute right, title and interest over there. That, he in exclusive possession of the said property, and recorded his name into the record of rights.

3. On the other hand, following is the description of the suit property, which the opposite party No.1/plaintiff, claims to be owned by him :

“Land measuring 1 Katha, comprised within Mouza - Sahar Cooch Behar, in R.S. Plot No. 10284 (part of L.R. Plot No. 13687) and municipal holding No.8451 comprised within ward No. 12.”

4. Alleged illegal encroachment of the suit property by the petitioner/defendant, is stated to be the cause of action of the said suit.
5. This being the factual backdrop of the case, it is further required to be indicated that in the said suit, the petitioner/defendant had filed a petition under Order 26 Rule 9 of the Civil Procedure Code, to seek Court's order for local investigation by Amin or expert, on the following queries :
- ***“Whether the defendants possessing the land of suit plots with proper fencing or not?***
 - ***Whether the plaintiff's description suit land is situated within the fencing of the defendants possession or not?***
 - ***Whether an entering gate of the defendants is situated at the front side of the suit plots and there is no other any gate except entering gate of the defendants or not?”***
6. The prayer of the petitioner for local investigation, under Order 26 Rule 9 of the Civil Procedure Code, has been rejected by the Court, by dint of the impugned order dated 6th May, 2024. Hence, this revision.
7. Mr. Mishra, while representing the petitioner would submit that in a dispute related with the boundary of the respective properties, as it is in the present suit, a local investigation would be imperative for the sake of proper adjudication of the case. The Amin shall inspect the disputed property physically and prepare his report, which may assist the court to come to a just and proper finding in the suit. He would submit further that the procedure envisaged under the provision of Order 26 Rule 9 of the Civil Procedure Code is to promote a just and proper decision and the Ld. Trial court has erroneously misconstrued the purpose thereof. He says that due and proper adjudication of the case would be jeopardised in absence of a

grass root level report, may be, to the serious detriment of petitioner's interests, which the court has failed to appreciate, while passing the order, as impugned in this case. He would lastly submit that for the ends of justice and proper adjudication of the case, the petitioner's prayer under Order 26 Rule 9 of the Civil Procedure Code, ought to have been allowed by the Ld. trial court. Thus, he seeks an appropriate order in this case.

8. Ms. Sehanabis (Mondal), represents the opposite parties. She has supported the impugned order and insisted for dismissal of the instant revision. She would submit that filing such prayer before the Ld. Trial court or present revision before this court are the tactics by the petitioner/defendant, to delay the proceedings. She would further say that the court has not committed any error in finding that the prayer of the petitioner/defendant under Order 26 Rule 9 of the Civil Procedure Code, is principally aimed towards collecting evidence in the case. The court has done the right thing by declining any such possibility, by rejecting petitioners prayer as above, in view of the settled principles of law that commission for local investigation, ought not to be issued by the Court for such a purpose, which would amount to collecting evidence in a case, she says. To buttress her submissions as above, she would rely on a judgment of a coordinate bench at Himachal Pradesh High Court, reported in **2023 SCC Online HP 1650 (Sh. Sanjeev Kumar vs. Sh. Yudhvir Singh)**. She would insist that the revision may be dismissed.
9. Order 26 Rule 9 of the Civil Procedure Code has provided for appointment of commissions to make local investigation. According to the same, it is the court which shall form an opinion that local investigation would be requisite or proper for the purpose of elucidating any matters in dispute. The court may also appoint such commission for ascertaining the market value of any property. Appointment of such commission would also be justified for ascertaining any amount of mesne profits or damages or annual net profit, under the said provision of law. In that case, the court would issue commission to an appropriate person to make such investigation and report to the court thereon.

- 10.** The petitioner says that in the present dispute, which is mainly concerned with the boundary of the respective properties of the parties, a local investigation report would facilitate the court by elucidating the matter as to how the boundaries of the respective properties situate. However, it is difficult to accept such contention of the petitioner. The description of the property claimed to be owned by the respective parties, have been mentioned above. The same would reveal that the suit not only deals with the question of boundaries but also title of the parties therein. As a matter of fact, a degree of declaration of title is what the opposite party No.1 has sought for in the said suit. Therefore the facts in issue in that suit have to be proved by adducing adequate and unimpeachable evidence before the court. In that event, appointment by the court of the Amin commissioner for local investigation would amount to delegation of judicial power by the court, which is not maintainable in the eye of law. It is a settled principle that judicial power conferred on a court must be exercised by it and cannot be delegated to anyone else. Hence, neither under Rule 9 of Order 26 of the CPC nor under any of the other provisions, the court was authorised to delegate the commissioner to try any issue of fact or of law or of mixed issue of fact and law.
- 11.** Therefore, no perversity can be found in the impugned order dated 6th May, 2024. It is a trite law that but for the purposes as enumerated in the said provision of law, commission cannot be issued for collecting evidence of the case. One can read Order 26 Rule 9 of the CPC with Order 18 Rule 18 thereof, which empowers a court to inspect any property or thing and also prepare a memorandum of any relevant facts observed at such inspection. It enables the court to understand the controversy between the parties. The purpose of issuing commission is somewhat similar, that is to have an overview through elucidation as to the crux of dispute between the parties. The same is to clarify or explicate an aspect involved in the suit, before the court. The same would never be an assertion or denial of a fact in issue, in a suit.
- 12.** Thus, having found no perversity or illegality in the impugned order dated 6th May, 2024, this court is inclined to dismiss the present revision case.

- 13.** Hence, C.O.No.110 of 2024 is dismissed. The impugned order dated 6th May, 2024, is upheld.
- 14.** Urgent Photostat certified copy of this judgment, if applied for, be made available to the parties upon compliance of all necessary formalities.

RAI
CHATTOPADHYAY

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(Rai Chattopadhyay, J.)