

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**C.O. 165 of 2023
Sri Ananda Chandra Paul
versus
Santosh Roy & Ors.**

For the Petitioner	: Mr. Saumyajyoti Dutta, Advocate Mr. Gopal Sah, Advocate
For the Opposite Party- Defendant	: Mr. Bhaskar Roy Mahashaya, Advocate
Heard on	: 14.06.2024
Judgment on	: 05.10.2024

Bivas Pattanayak, J. :-

1. This application has been preferred by the petitioner-plaintiff under Article 227 of the Constitution of India challenging Order No.100 dated 20th September, 2023 passed by learned Civil Judge (Junior Division), 2nd Court, Jalpaiguri in Title Suit No. 112 of 2012 rejecting the prayer of the petitioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'Code').

2. The brief fact of the case in nutshell is that the petitioner-plaintiff filed a suit for declaration and permanent injunction before the learned Trial Court registered as Title Suit No. 112 of 2012. During the pendency of the suit, the opposite parties-defendant nos.1 to 9 trespassed into a portion of the suit land by dispossessing the petitioner-plaintiff. Accordingly, the petitioner-plaintiff by way of amendment of the plaint

inserted a prayer for a decree of recovery of possession of the suit property. The suit was taken up for examination of the witnesses. At the said stage of examination of witnesses, the petitioner-plaintiff filed an application under Order XXVI Rule 9 of the Code for local investigation commission of the suit property by survey commissioner. Upon hearing, the aforesaid petition of the petitioner-plaintiff under Order XXVI Rule 9 of the Code was rejected by the learned trial court by the impugned order under challenge. Being aggrieved by and dissatisfied with the impugned order, the petitioner-plaintiff has preferred the present revisional application.

3. Mr. Saumyajyoti Dutta, learned advocate for the petitioner-plaintiff submitted that the plaintiff purchased a Tea Plantation Project located at Manirbari within Mouza Khayerkhal and Padamoti under P.S. Maynaguri, measuring more or less 17.52 acres from the erstwhile vendor *Lotus Project Private Limited* by way of registered deeds of purchase. Subsequent thereto, the petitioner-plaintiff got the land measuring more or less 9.47 acres, covered by the plantation, mutated in his name and possessing the same by paying rent to the Government. Since some quantum of the land where tea plantation was made by erstwhile *Lotus Project Private Limited* were found to be vested, the plaintiff applied for long term lease in respect of those plots of the tea project under his exclusive physical possession. On 22nd November, 2015, the defendant nos. 1 to 9 forcibly trespassed into a portion of the suit land by way of dispossessing the rightful, lawful owner i.e. the petitioner-plaintiff. The defendant nos. 1 to 9 are nothing but rank trespassers having no manner of legal right, title, authority to possess the said portion of the suit property. In order to recover the portion of the suit

land trespassed and illegally possessed by the defendants, the plaintiff incorporated a prayer for a decree of recovery of possession. In the suit on the prayer of the petitioner-plaintiff, an order of *status quo* was passed. For violation/disobedience of the said order, an application under Order XXXIX Rule 2A of the Code read with Section 151 of the Code was filed. While dismissing the said application, the Court held that there is no demarcation of the suit land and as such, local investigation commission is very vital to distinctly identify the suit property. The defendants by filing their written statement have also stated that the suit land is not identifiable and it has never been demarcated or partitioned. It is also settled position of law that where there is dispute with regard to demarcation and boundary, the same can only be ascertained by way of survey commission. To buttress his aforesaid contentions, he relied on the following decision:

- i. ***Shreepat versus Rajendra Prasad & Ors.*¹**
- ii. ***Haryana Waqf Board versus Shanti Sarup and Others*²**
- iii. ***Sultan Ahmed Mullick & Anr. versus Mehraj Mullick*³**
- iv. ***Sri Shadaksharappa versus Kumari Vijayalaxmi*⁴**

In view of his aforesaid submissions, he prayed that the revisional application be allowed setting aside the impugned order of the learned Trial Court rejecting the prayer of the petitioner-plaintiff for local investigation commission.

¹ **2000 (3) ICC 728**

² **(2008) 8 SCC 671**

³ **(2012) 1 WBLR (Cal) 67**

⁴ **2023 (3) ICC 57**

4. On the contrary, Mr. Bhaskar Roy Mahashaya, learned advocate for the opposite party-defendant submitted that the application of the petitioner-plaintiff seeking local investigation commission under Order XXVI Rule 9 of the Code is nothing but to fish out and collect evidence. The application has been filed at a stage when the peremptory hearing of the suit and the examination of the witnesses is in progress. The petitioner-plaintiff has not made out any case of dispute with regard to demarcation. The schedule of the plaint does not depict of any boundary. Therefore, the application seeking for local investigation commission is misconceived. In an action for recovery of possession of immovable properties, the pleadings and documents must establish that the petitioner-plaintiff has title to a particular property. Referring to the deposition of the petitioner-plaintiff in cross-examination, he indicates that the petitioner-plaintiff has admitted that he has got no documents in support of his right, title and interest over the suit land except the Letter of Intent and has also admitted that he is not entitled to any relief till the lease is granted by Government over the suit property. The title suit for possession has two parts – first adjudication of title and second adjudication of possession. In the present case at hand, the petitioner-plaintiff by way of admission in his evidence has accepted that he has got no right, title and interest over the suit property, therefore, the question of recovery of possession does not arise at all. At the same time, the appointment of a commissioner to hold local investigation commission would be a futile exercise as the same is found to have been applied only in order to fetch and collect evidence nothing more nothing less. In support

of his aforesaid contentions, he relied on the decision of Hon'ble Supreme Court passed in ***Maria Margarida Sequeria Fernandes & Ors. versus Erasmo Jack De Sequeria (D) Through Lrs.***⁵

5. Having heard learned advocates for respective parties, the sole issue which has fallen for consideration is whether the learned trial court was justified in rejecting the prayer of the petitioner-plaintiff for local investigation commission under Order XXVI Rule 9 of the Code.

6. Upon perusal of the plaint, it is found that it is the specific case of the petitioner-plaintiff that he purchased a tea plantation project from the erstwhile vendor *Lotus Project Private Limited* covering area measuring 17.52 acres within Mouza Khayerkhal, J.L. No. 54, and Padamoti, J.L. No. 52 comprising several plots vide registered deeds of purchase. It is further case of the petitioner-plaintiff that 9.47 acres was mutated in his name and in respect of some quantum of land the petitioner-plaintiff had applied for a long term lease of the land in his exclusive possession since the same was vested with the State. It is further contended that a portion of the suit land which was in possession of the petitioner-plaintiff was trespassed by the defendant nos. 1 to 9. The plaintiff has also made a prayer for decree of recovery of possession. The defendant nos. 3 to 8 filed their written statement contending that the suit land is not identifiable and the land has never been demarcated or partitioned. The defendants have been growing tea in the vested lands measuring about 6.25 acres situated in Mouza Khayerkhal and Padamoti under P.S. Maynaguri, District Jalpaiguri since 1995-96. On comparative analysis of the pleadings as aforesaid,

⁵ (2012) 3 WBLR (SC) 122

there cannot be any quarrel over the fact that there is a serious dispute with regard to the area and boundary of the land in question between the parties. The petitioner-plaintiff has also pleaded a case of trespass of land by the defendants and recovery of the encroached land. The identity of the suit property has also been challenged in the written statement. One cannot be oblivious to the fact that while dismissing the application under Order XXXIX Rule 2A of the Code (Misc Case No. 21 of 2012) for disobedience/violation of the order of injunction, the learned trial court observed that where there is no specific boundary of the suit property, the local investigation commission is a very vital step to distinctly identify the suit property. The learned trial court rejected the application of the petitioner-plaintiff for local investigation commission on the ground that such application has been made to fish out evidence and also took note of the fact that the application has been filed after ten years of institution of the suit. It is placed on record that the provisions under Order XXVI Rule 9 of the Code is not “stage” centric. Thus provisions can be invoked either before the trial has commenced or after commencement.

7. At this stage, it would be profitable to reproduce the relevant provision under Order XXVI Rule 9 of the Code as hereunder:

“9. Commissions to make local investigations.—*In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

8. The provisions clearly manifest that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne* profits or damages or annual net profits, the Court may issue a commission to make such investigation. In the present case at hand, there is a dispute with regard to trespass/encroachment against the defendants as well as area and boundaries of the land in question. Therefore, in order to ascertain the aforesaid aspect, the only recourse is to direct for a local investigation commission.

9. In *Shreepat (supra)*, Hon'ble Supreme Court has held as follows:

"3. The principal contention raised by learned Counsel for the Appellant is that though there was a serious dispute with regard to the identity of the land in dispute, whether the land in dispute formed part of Khasra No. 257/3 or Khasra No. 257/1, the Courts below did not get the identity established and decreed the suit of the Respondent only on the basis of oral evidence which was not sufficient for the purpose of establishing the identity of the land in dispute at the spot.

4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No. 257/3 or Khasra No. 257/1. This having not been done has resulted in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the Courts below as affirmed by the High Court and remand the case to the trial Court to dispose of the suit afresh in the light of the observations made above and in accordance with law."

10. In *Shanti Sarup (supra)*, Hon'ble Supreme Court has held as follows:

"3. The dispute that was raised by the parties before the court was whether the respondent had encroached upon any land

belonging to the appellant Board. Therefore, it cannot be in dispute that the dispute was in respect of the encroachment of the suit land.

4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.”

11. In *Sultan Ahmed Mullick (supra)*, this Hon’ble Court has held as follows:

“5. The plaintiffs have contended that they have taken loan from the Bank for repairing of their house and when the defendant resisted they were compelled to file the suit for the reliefs stated earlier. So far as the possession of the properties by the parties in respect of Schedule ‘A’, ‘B’ and ‘C’ is concerned, there is no dispute. The plaintiffs have right, title and interest over ‘A’ & ‘B’ Schedule property and the defendants have no right, title and interest over the Schedule ‘A’ and ‘B’ property. But the defendant has right, title, interest and possession over Schedule ‘C’ property. It is the specific case of the plaintiffs that the defendants are trying to encroach a portion of the ‘B’ Schedule property which is denied by the defendant. Therefore, I find that there is a dispute as to the extent of possession by the respective parties in respect of the properties as described in Schedule ‘A’, ‘B’ and ‘C’ and such dispute between the parties is nothing but a boundary dispute. Such boundary dispute could only be solved by appointment of a Survey Passed Commissioner by holding a local investigation and thereby by deciding the extent of possession of the lands by the respective parties.”

12. Bearing in mind the aforesaid proposition, it manifest that where the dispute relates to area of land, identity of land, boundaries of the land, encroachment and case of demarcation, it is appropriate to direct for local investigation commission.

13. The appointment of a commissioner for local investigation is indeed to secure the evidence and the same is not only permissible but also desirable in certain cases. The report, given the intrinsic complexities of

matter in a case, may go a long way in arriving at a just decision or assisting the Court to appreciate the other evidence on record or fact situation in a proper perspective. If the report of the commissioner is nothing to do with the subject matter in dispute, then there cannot be an order appointing the commissioner. Order appointing a commissioner can be made only if the commissioner's report becomes a relevant piece of evidence. Therefore, the reason of the learned trial court rejecting the application on the ground that such appointment of local investigation commissioner amounts to collection of evidence does not hold good. For the reasons as aforesaid, the rejection of the application on the ground of delay in making the application also falls short of merit. Further delay cannot be a ground to shut the door to secure a relevant piece of evidence which may help and assist the Court in arriving at a just decision.

14. Such being the position, this Court finds substance in the argument of Mr. Dutta, learned advocate for the petitioner relying on *Shreepat (supra)*, *Shanti Sarup (supra)*, *Sultan Ahmed Mullick (supra)* and *Sri Shadaksharappa (supra)*.

15. The decision *Maria Margarida Sequeria Fernandes (supra)* lays down the proposition that in a title suit for possession, firstly title has to be adjudicated and secondly possession. Be that as it may, the decision is factually distinguishable from the case at hand.

16. In view of the above discussion, the civil revision being **C.O 165 of 2023** stands allowed. The Order No.100 dated 20th September, 2023 passed by learned Civil Judge (Junior Division), 2nd Court, Jalpaiguri in

Title Suit No. 112 of 2012 rejecting the prayer of the petitioner under Order XXVI Rule 9 of the Code is set aside.

17. The application of the petitioner-plaintiff for appointment of a local investigation commissioner Order XXVI Rule 9 of the Code stands allowed. Learned trial court is directed to appoint a local investigation commissioner for holding commission.

18. There shall be no order as to costs.

19. All connected applications, if any, stand disposed of.

20. Interim order, if any, stands vacated.

21. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)