

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

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 1033 of 2021

Tarun Ghosh alias Tarun Kanti Ghosh & Anr.

VERSUS

Tapati Roy & Ors.

For the Petitioners:

Mr. Animesh Paul, Adv.
Ms. Susmita Ghorai, Adv.

For the Opposite Party No. 6:

Ms. Ipsita Ghosh, Adv.

Last Heard on: December 17, 2024

Judgment on: January 31, 2025

Biswaroop Chowdhury,J:

The petitioners before this Court are the defendants in a suit for declaration and permanent injunction and is aggrieved by the Order dated 26.03.2021 passed by Learned Civil Judge (Senior Division) 1st court at Howrah in Title Suit no. 123 of 2021 in allowing petition filed by plaintiffs/opposite parties under Order 39 Rule 7 of the Code of Civil Procedure by treating the same as additional grounds to the petition under Order 39 Rule 7 CPC filed by the defendants/petitioners.

The petitioners being aggrieved by the said Order has come up with this application under Article 227 of the Constitution of India.

The case of the petitioners in the plaint under Order 39 Rule 7 of the Code of Civil Procedure before the Learned Trial Court may be summed up thus:

1. The plaintiffs have filed the instant suit for declaration and permanent injunction against the defendants and the defendants have appeared and filed written objection.
2. The case of the plaintiffs in the plaint is that the plaintiffs and Proforma defendants are the alleged owners and occupiers of 'A' schedule noted property of the plaint and there was/is existence of a passage on the well demarcated purchased property of the defendant no. 1 and 2 (i.e. the schedule property) which is allegedly the only ingress and egress passage of the A schedule property and the defendants are allegedly trying to block the B schedule passage by raising/constructing boundary wall and also allegedly trying to encroach a portion of Eastern side of the 'A' schedule property.
3. The defendants have purchased well demarcated Danga land (i.e. the 'C' schedule property of the plaint) by virtue of 3 registered deeds of sale and the said property is already encompassed by boundary-wall with requisite side space to prevent mischief, waste, damage and invasion of rights. There is no existence of any passage in the

purchased property of the defendant and there is another alternative path which was/is used by the plaintiffs and proforma defendants for their ingress and egress.

4. That there is a bona fide dispute between the parties regarding the nature character and mode of user of the suit properties and pending adjudication of the said dispute the nature character mode of user and actual topography of the suit property is required to be brought on record by appointing a local inspection commissioner to reach on to a just conclusion in respect of the Injunction Application which will help the Learned Court in arising at a just conclusion regarding the dispute in controversies between the litigating parties. Moreover the plaintiffs will not be prejudiced in any way if the actual topography nature and character of the suit properties is allowed to be brought on record.
5. That for protection preservation and inspection of the suit property a local inspection commissioner is required to be appointed at the cost of the petitioners/defendants to hold commission on the following points.
 - i) To draw a rough sketch map of the suit properties showing actual topography.
 - ii) To note the nature character of the suit properties.
 - iii) To note if any other local feature/ features if any.

Pursuant to the filing of application under Order 39 Rule 7 CPC the plaintiffs/opposite parties filed application for addition of other grounds which are as follows:

A) whether there is any (new or old) construction particularly boundary wall Iron gate and/or other bricks built structure is situated at and over the 'B' and 'C' Schedule mentioned property or not ?

b) whether there are any building materials i.e. bricks sand, cement iron rod is stacked and/or situated at and over the said property?

Learned Trial Court upon considering the petitions filed under Order 39 Rule 7 of the Code of Civil Procedure filed by the defendants/petitioners and the plaintiffs/opposite parties was pleased to dispose the same by observing and directing as follows:

It appears from the record that plaintiff filed an injunction petition on 23.02.2021 but, there was caveat and therefore, plaintiff was directed to serve notice.

It appears from the record that on 09.03.2021 the defendants appeared and filed WO and WS along with another petition u/o 39 r 7 CPC.

On 19.03.2021, one petition was filed on put up and the date hearing of this case was preponed.

On 26.03.2021 the defendant filed a petition praying for hearing of the petition filed by the defendants u/o 39 r 7 CPC on 23.02.2021 before hearing of injunction petition.

On the same date the plaintiff also filed another petition u/o 39 r 7 CPC praying for addition of other grounds with the defendant's application u/o 39 r 7 r/w s 151 CPC.

In this circumstances, considering both parties approached the court, regarding hearing of the petition u/o 39 r 7 CPC, the purpose of which also for detention, preservation and inspection of the subject matter of the suit, the court proceeding with the hearing of the petition filed by both sides, u/o 39 r 7 CPC.

Regarding the inspection petition, the Ld. Advocates for the defendants submitted that the prayer of the defendants u/o 39 r 7 CPC is simple as to taking note of nature and character of suit properties and draw rough sketch map and other local feature, but the Ld. Advocate for the defendant raised objection regarding point No. (a) and (b) of the plaintiff's petition u/o 39 r 7 CPC as the Ld. Advocate submitted that it is well settled now that a commission cannot be issued for the purpose of collecting evidence. The Ld. Advocate referred the decision reported in AIR 1974 Cal 296.

The Ld. Advocate for the plaintiff on the other hand submitted before the court that admittedly the property situated in the A schedule belonged to the plaintiff and C schedule belonged to the defendants. The dispute which

cropped up between the parties, regarding B schedule property which as per the plaintiffs is a property where plaintiff has easement right, whereas, the claim of the defendants is the B schedule property is part and parcel of C schedule property and therefore, there is no right of the plaintiff.

The Ld. Advocate for the plaintiff produced some photographs which shows some sort of construction is going on and boundary wall has been raised and plaintiff prayed for injunction in respect of the same.

Therefore, for considering the petition u/o 39 r 7 CPC, the court has to consider whether the inspection of the suit property is at this stage required or not.

On perusal of the record and claim of the parties, it appears that the main dispute is relating to B schedule passage. On perusal of the plaintiff's petition u/o 39 r 7 CPC in point No.A it appears that the plaintiff prayed for inspection to the effect that, "whether there is any new or old construction, particularly boundary wall, iron gate, any other brick build structure is situated at and over B and C schedule mentioned property or not."

As per the plaint the B schedule property is situated at the eastern side of the A schedule property and over this B schedule property the plaintiff has prayed for declaration of his right of easement of necessity. Whereas, the defendants claimed that this B schedule property is part and parcel of C schedule property over which the plaintiff has no manner of right, title and interest.

At this stage, no map or document produced by either side relating to this claim and the injunction petition is filed by the plaintiff praying for issuance of temporary injunction restraining the defendants from encroaching, changing the nature and character of the eastern side of A schedule property and also erecting any sort of construction at schedule B mentioned passage in any manner whatsoever. The plaintiff further prays for restraining or causing any hindrance, interruption, objection to ingress and egress of the plaintiffs and outletting water of A schedule property to B schedule mentioned passage.

Therefore, at this stage, by way of inspection it is difficult for a Ld. Advocate Commission to ascertain particularly the situation of B schedule and C schedule property distinctly. But, by way of inspection it can be brought into the record that whether there is any construction or boundary wall at the eastern side of the A schedule property which completely obstructed the plaintiff's entrance into A schedule property and therefore, the point No.(a) of the plaintiff cannot be granted as it is mentioned in the petition rather this point can be reframed as following:-

Whether there is any construction, particularly boundary wall, iron gate or any other brick built structure at the eastern side of A schedule property.

On this score this court is inclined to allow the petition filed by the defendant and petition filed by the plaintiff u/0 39 r 7 CPC is also allowed subjected to modification of point No.1 as mentioned above.

During hearing the Ld. Advocate for the plaintiff submitted that since there is admission on part of the defendant regarding the ownership of the plaintiff over the A schedule property there is no bar to grant injunction in respect of the A schedule property in favour of the plaintiff at this stage but without hearing of both sides, no order in that respect can be granted.

Hence, it is

Ordered

That, the petition filed by the defendant u/o 39 r 7 r/w s 151 CPC dt. 09.03.2021 is allowed on contest and disposed of accordingly. The petition filed by the plaintiff dt. 26.03.2021 is also allowed subject to modification as mentioned above.'

The petitioners/defendants being aggrieved by Order dated 05-04-2021 passed by Learned Trial Court has come up with this application under Article 227 of the Constitution of India.

It is the contention of the petitioners that the Learned Trial Court acted illegally and with material irregularity, in allowing application filed by opposite party No. 1 to 8 on 26-03-2021 in as much as the said application having been filed for addition of grounds with the petitioner's application filed under Order 39 Rule 7 read with Section 151 of the Code of Civil Procedure 1908 on the face of it is not maintainable in the eye of law. It is further submitted that the Learned Trial Court acted illegally and with material irregularity in failing to

consider that the application filed by the opposite party was aimed to collect evidence which is not permissible in the eye of law. It is also submitted that the order impugned to the extent of allowing the application filed by the opposite party Nos. 1 to 8 herein thereby directing local inspection on the points mentioned therein with the modification indicated in the order impugned suffer from lack of application of judicious mind and the same is bad illegal and perverse.

Pursuant to the filing of this application notice was issued upon the opposite parties. Opposite party no-6 appeared and contested the application. Opposite parties no-1 to 5, 7 and 8 did not appear to contest this case.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party no-6, perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that Learned Trial Court erred in allowing the petition of the plaintiffs/opposite parties when the said petition was filed for adding more grounds to the petition of the petitioner. Learned Advocate further submits that in the event the plaintiffs/opposite parties felt the requirement of inspection of the suit property the plaintiffs/opposite parties could have taken out an application under Order 39 Rule 7 of the Code of Civil Procedure. Learned Advocate also submits that the object of the plaintiffs/opposite parties in making the application under Order 39 Rule 7 of the Code of Civil Procedure is to collect evidence which is not permissible in law.

Learned Advocate for the opposite party no-6 submits that the Learned Trial Court has rightly passed the order. Learned Advocate further draws attention to the provisions contained in Order 39 Rule 7 of the Code of Civil Procedure and submits that Clause (c) of sub-rule-1 of Rule 7 of Order XXXIX of the Code of Civil Procedure empowers the Court to authorise a commissioner to cause inspection which is necessary to obtain full information or evidence.

Before proceeding to consider the material in issue at the very outset it is to be remembered that as Courts have power under Order XXXIX Rule 1 of the Code of Civil Procedure to pass temporary injunction to prevent any property in dispute from being wasted damaged or wrongfully alienated it has power to make an order for detention and preservation and inspection of suit property under Order XXXIX Rule 7 of the Code of Civil Procedure.

The provisions of Order 39 Rule 7 of the Code of Civil Procedure are as follows:-

Rule 7. Detention, preservation, inspection etc., of subject matter of suit.

- 1) The Court may on the application of any party to a suit and on such terms as it thinks fit-
 - a) Make an order for the detention preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein;

- b) For all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and
- c) For all or any of the purposes aforesaid authorise any samples to be taken or any observation to be made or experiment to be tried which may seem necessary or expedient for the purpose of obtaining full information or evidence.

Thus upon plain reading of the provisions contained in Rule 1 and Rule 7 of Order XXXIX of the Code of Civil Procedure it will appear that the Code has conferred power upon the Court to grant temporary injunction during pendency of the suit for the purpose of staying, preventing the wasting damaging, alienation, sale or disposal of the suit property as per Rule 1 of Order XXXIX and also has power to make an order for detention preservation or inspection of any property under Rule 7 of Order XXXIX CPC which is subject-matter of such suit or as to which any question may arise therein.

Thus clause (a) of sub-Rule 1, Rule-7 of Order XXXIX empowers the Court to pass necessary orders for inspection of property which is subject-matter of such suit or which question may arise therein. As the Court's function is to deal with and adjudicate questions which arise with regard to suit property or others, in relation to the suit, necessary inspection order can be issued by the Court to get a true picture of the said property. Moreover clause (c) of sub-rule 1, Rule-7 of the said order empowers the Court to

authorise any observation to be made with regard to any property in connection with the suit which according to the Court seems expedient for the purpose of obtaining full information or evidence.

As Courts have power to direct maintenance of Status-quo with regard to nature character or possession of the suit property it is necessary to ascertain the status of the property before directing status-quo to be maintained. Thus it cannot be argued that causing inspection of the suit property to ascertain the present nature character and particulars with regard to suit property cannot be done as it amounts to collection of evidence.

In the case of Meghraj Gayatri Devi V Jetling Rajeshwar reported in AIR-2001 A.P. the Hon'ble Court observed as follows:

‘Order 39, Rule 7 CPC empowers the Court to make an order for detention, preservation and inspection of any property which is the subject-matter of the suit or as to which any question may arise in the suit. The submission that the power under Rule 7 can be exercised only in respect of the subject-matter is therefore not well founded.

The power is not only with regard to subject-matter of the suit but also with reference to any question that may arise in the suit. It is within the discretion of the Court to exercise power under relevant rule even with regard to a question that may arise subsequently. However, while exercising the power for passing an order of detention, preservation and inspection of the subject-

matter of property no difficulty would arise. However, in relation to the other aspect as to the questions that may arise in the situation, the trial Court should be guided by the pleadings of the parties. In a suit for injunction, though the question of possession as on the date of filing of the suit is most relevant, there may be other ancillary and incidental questions as to the conduct of the parties before the Court. As an alternative plea, a defendant is always entitled to say that he has been forcibly evicted prior to filing of the suit and during such operation, some of the his belongings remained in the suit schedule property and in such case it is always a question in relation to the main dispute between the parties.'

In the case of Sisir Saha and ors V Baby Begam Alias Mehera Begum and Anr; reported in (2011) 1 CIVLJ-754 the Hon'ble Court observed as follows:

'I do not find any substance in the submissions made on behalf of the plaintiffs/opposite parties that a disputed question of facts with regard to existence of a path way on a particular plot of land or to a plot of land adjacent thereto can be ascertained without taking physical measurement of the same by appointing a Commissioner. I do not accept the submissions made on behalf of the plaintiffs/opposite parties that it is an attempt on the part of the petitioners for fishing out evidence. I do not find that the decision of Institution of Engineers (Supra) has any manner of application in this case in view of the distinguishable facts

and circumstances of that case. In that case the issue was alleged forgery with regard to the proxy vote in connection with an election.'

The subject matter in the instant suit is Danga Land measuring about 40 sataks and passage of 30 ft in length on which the plaintiffs/opposite parties sought declaration. An injunction application is also pending for disposal. The defendant's prayer for inspection is to draw rough sketch map of the suit properties showing actual topography and to note the nature and character of the suit properties or to note any other local feature. On the other hand the plaintiff's prayer for inspection under Order 39 Rule 7 of the Code of Civil Procedure was to ascertain as to whether there is any (new or old) construction particularly boundary wall, Iron gate and/or any other bricks built structure is situated at and over the 'B' and 'C' schedule mentioned property or not and whether there are any building materials i.e. bricks, sand, cement iron rod is stacked and/or situated at and over the said property. An application for injunction is also filed by the plaintiff/opposite parties with a prayer for restraining the defendants/petitioner from encroaching, changing the nature and character of the eastern side of A schedule property and also erecting any sort of construction at schedule 'B' mentioned passage in any manner whatsoever. Hence in order to consider the prayer for injunction filed by the plaintiffs it is necessary to ascertain by way of inspection the schedule of points raised by both the plaintiffs and defendants. The Learned Trial Court upon considering the position that no map or document is produced by either

side relating to the claim and considering the prayer for injunction was pleased to reframe the schedule submitted for inspection by the plaintiffs by observing as follows:

‘Therefore at this stage, by way of inspection it is difficult for a Ld. Advocate Commission to ascertain particularly the situation of B schedule and C-schedule property distinctly. But by way of inspection it can be brought into the record that whether there is any construction or boundary wall at the eastern side of the ‘A’ schedule property which completely obstructed the plaintiff’s entrance into A schedule property and therefore the point No. (a) of the plaintiff cannot be granted as it is mentioned in the petition rather the point can be reframed as following.

Whether there is any construction, particularly boundary wall, iron gate or any other brick built structure at the eastern side of ‘A’ schedule Property.’

Thus from the reasons assigned in the order which is assailed before this Court there does not appear to be any infirmity.

As Rule 7(1)(c) of Order XXXIX CPC empowers the Court to authorise any observation to be made which may seem necessary or expedient for the purpose of obtaining full information or evidence a narrow pedantic approach to the said provision under Rule-7 Order XXXIX cannot be taken that the said provision cannot be invoked for collecting evidence but a broad pragmatic view should be taken.

Right to property although is not a Fundamental right but it is a Constitutional Right. Thus all persons have right to enjoy property owned or lawfully occupied by them without any undue interference by others. Thus when right to property of a person is obstructed or is under challenge the person aggrieved can move the competent court of law for necessary declaration and relief. In exercise of the powers conferred under Order 39 Rule 7 of the Code of Civil Procedure Courts can direct inspection of suit property to obtain information and decide the questions with regard to such property to protect the rights of the litigants which is obstructed or under challenge.

Upon considering the facts of the case and the provisions contained in Order 39 Rule 7 of the Code of Civil Procedure this Court is of the view that the Order dated 26/03/2021 passed by Learned Civil Judge Senior Division, 1st Court at Howrah in Title Suit No-123/2021 does not suffer from any infirmity. Thus this application under Article 227 of the Constitution of India fails and the same is dismissed.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury,J)