

M/L- 501
16/07/2025
Ct. No.-6
Aritra

C.O. 1305 of 2024

**Dipak Maity & Anr.
Vs.
Sri Apurba Maity & Ors.**

Mr. S. Ray
Mr. S. Naskar

...for the petitioners

This application under Article 227 of the Constitution of India is at the instance of the defendants and is directed against an order being No.39 dated January 18, 2024 passed by the learned Civil Judge (Jr. Div.), 1st Court, Contai, District-Purba Medinipur in Title Suit No.128 of 2017.

By the order impugned the application under Order 26 Rule 9 of the Code of Civil Procedure stood allowed.

The learned advocate appearing for the petitioner submits that the application for local investigation was allowed by the learned trial judge by a totally non-speaking order. He submits that there was an earlier suit for partition and the parties were allotted their respective allotments pursuant to the final decree passed in the said partition suit. He, therefore, submits that there is no necessity for holding a further local investigation.

The opposite parties herein filed a suit for declaration of title and for mandatory injunction in respect of Ka/2 schedule property. The opposite party

filed an application for local investigation under Order 26 Rule 9 of the Code of Civil Procedure which stood allowed by the learned trial judge.

The learned advocate appearing for the petitioner would contend that the suit is at the initial stage as only the written statement has been filed by the opposite parties. He submits that the application for local investigation was filed at a premature stage as the suit has not yet been set down for recording evidence. He placed reliance upon a decision of the Hon'ble High Court at Karnataka in the case of **B. Jagannath vs. N.C. Narayanappa & Anr.**, reported at **AIR 1982 Karnataka 233**, in support of his contention that local investigation cannot be sought for prior to the suit been set down for recording evidence. He further submits that the appointment of an advocate commissioner is only to aid the Court to assess the evidence laid by both the parties and the learned trial judge ought not to have allowed such application at the initial stage of the suit.

After going through the provisions of Order 26 Rule 9 of the Code of Civil Procedure, to the mind of this Court there is nothing in the said provision which states that such an application has to be filed after the suit is set down for recording evidence.

Order 26 Rule 9 of the Code of Civil Procedure states 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 such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Order 26 Rule 10(2) of the Code of Civil Procedure states that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record.

It is well-settled that the report of a Commissioner is only a piece of evidence which will be considered by the learned trial judge at the time of final hearing of the suit along with other evidences on record.

The decision of the Hon'ble Madras High Court in the case of **Muthusamy Gounder vs. Mylsamy Gounder**, reported at **AIR 2007 Madras 50** cited by the learned advocate for the petitioner supports the view taken by this Court.

The decisions of the Hon'ble High Court at Karnataka in **B. Jagannath (supra)** cannot be said to be a binding precedent upon this Court. Since the provisions of Order 26 Rule 9 of the Code does not specifically state that an application for local investigation has to be filed only after the suit is set down for recording evidence, this Court is not inclined to follow the decision in the case of **B. Jagannath (supra)**.

After going through the points of local investigation, this Court finds that the same is necessary for the purpose of elucidating the matter in dispute in the suit in which a decree for mandatory injunction has been sought for.

The learned trial judge has noted that there is a dispute between the parties with regard to the measurement of the suit property and there is also an allegation of encroachment by one party against the other.

Thus, this Court finds that the learned trial judge has assigned cogent reasons for allowing the said application for local investigation.

This Court does not find any reason to interfere with such order.

Accordingly, CO 1305 of 2024 stands dismissed.

There will be no order as to costs.

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

(Hiranmay Bhattacharyya, J.)