

07.08.2025
Item No.10
KS
Ct. No.446

C.O. 3778 of 2024
Shri Anil Shaw
Versus
Shri Vivek Kundalia

Mr. Iftekar Munshi
Ms. Sampurna Chatterjee
.....For the Petitioner

Mr. Rwitendra Banerjee
Mr. Aritra Roychowdhury
.....For the Opposite Party

1. This revisional application has been filed challenging an order dated 5th September, 2024 passed by the learned Court of Civil Judge (Senior Division), 2nd Court, Alipore, South 24 Parganas in Title Suit No.249 of 2018 whereby the application filed under Order 39 Rule 7 of the Code of Civil Procedure has been rejected as filed by the present petitioner being the defendant in this case. The suit was filed by the present opposite party/plaintiff against the present petitioner for recovery of Khas possession in respect of B Schedule property by evicting the defendant therefrom and also for a decree for *mesne profit* @ Rs.30,000/- tentatively from 3rd January, 2018 till the date of recovery. The present petitioner being the defendant entered appearance and filed the written statement, and averred in para 17 about dismissal of a previous sheet and further the schedule will be inspected by holding local inspection.
2. It is further contended by filing the written statement in paragraph 17.

“17. That as the description of possession had not been described, the case was dismissed which was due to wrong advise, but not for the fault of the plaintiff in T.S. no.44 of 2008 defendant in this case. This defendant is describing his possession at the schedule to this written statement which will be proved by local inspection to be held of the cost of this defendant during the pendency of this suit.”

3. Learned advocate appearing on behalf of the petitioner argued that the learned Court misinterpreted the provision under Order 39 Rule 7 of the Code and came to a finding that the defendant by filing the petition is intending to fetch the evidence on record.
4. Furthermore, it is argued that since the property has been described in the 'B' schedule of the plaint, it is necessary for the defendant being the petitioner herein to controvert the same and to establish his defense case by adducing cogent evidence and there is no other provision other than Order 39 Rule 7 of the Code under which the inspection of the suit property can be held or the measurement of the suit property can be considered.
5. In order to substantiate his contention, the learned advocate has relied upon a decision reported in *2009 (3) ICC Satyanarayan Dass & Anr. Vs. Prabhunath Keshri (Shaw) & Anr.*
6. He has further relied upon a decision reported in *1995 SCC Online Cal 206* in the case of *Amar Singh Saini Vs. Rup Chand Das & Anr.* The other decision has cited by the learned advocate reported in *2001 SCC Online Cal 491* in the case of *Santosh Kumar Saha Vs. Gita Paul & Ors.*

7. It is further submitted that prior to filing of this application under Order 39 Rule 7, another application was filed on their behalf, which was rejected on account of improper description of the property and subsequently, an amendment application was filed on their behalf, which was allowed and thereafter, this application has been filed and the suit has come to a stage where the evidence of DW 1 has commenced.
8. Learned advocate appearing on behalf of the opposite party raises vehement objection and submits that the present defendant being a trespasser has dispossessed the present plaintiff for which the suit has been filed for recovery of possession.
9. It is further submitted that the defendant in his written statement in the Schedule has accepted that he is in possession of the same suit property in respect of which the suit has been filed.
10. He further argued that the submission of the learned advocate appearing for the petitioner that there is no other provision excepting under Order 39 Rule 7 is disputed as there is another provision under Order 26 Rule 9 of the Code of Civil Procedure but the present petitioner's case is not coming under the parameters of the said Order 26 Rule 9 and accordingly, prays for dismissal of this revisional application.

11. Having heard both the learned counsel and going through the materials on record and also going through the pleadings of the parties, it is evident that the suit has been filed for recovery of possession in respect of the B Schedule property, which is described as follows:-

“Schedule B

All THAT one room having tiled shed measuring 48(Forth-eight) Square Feet be the same a little more or less on the South-Western corner of the premises being Premises No.56/1, Lansdowne Road, now known and numbered as 56/1, Sarat Bose Road, Police Station: Ballygunge, Kolkata: 700025, District: 24 Parganas(South)”

12. The defendant by filing the written statement in his Schedule also accepted the suit property. It is settled law and a mandate of the relevant provision of the Code of Civil Procedure that the defendant must deny each and every allegation in respect of the plaint in order to substantiate his own case. In the instant case, not a single averment is found whereby denial was there regarding the Schedule – ‘B’ of the plaint, which has been mentioned by the plaintiff in respect of which the possession of the defendant is agitated by filing the plaint.

13. I am unable to accept the contention of the learned advocate appearing on behalf of the petitioner that his effort by filing this application under Order 39 Rule 7 of the Code of Civil Procedure is not of fishing out evidence or collecting the evidence to develop his own case since the petitioner/defendant in the schedule mentioned in his written statement accepted.

The address mentioned in the plaint and never challenged the measurement as found in schedule B.

14. In the judgment that has been relied upon by the learned advocate in the case of *Satyanarayan Dass (supra)*, the Coordinate Bench of this Court discussed the applicable provision of law and observed that the legislature has given wide description to a Court to ensure detention/preservation, inspection etc. of subject-matter of suit or as to which any question may arise therein and did not consider the submission of the learned advocate appeared on behalf of the petitioner that holding of inspection by the Commissioner appointed by the learned Court under Order 39 Rule 7 of the Code of Civil Procedure would amount to collection of evidence.
15. In the said case, the issue was that the suit premises was under lock and key by the plaintiff when the defendant most illegally locked the door of the suit premises by his own lock and on the next morning when the plaintiff went to the suit premises and detected the same, he was denied the entry by the defendant and in order to ascertain the application was filed.
16. In the instant case, the fact is very different than that of the said case where a suit has been filed in respect of specific Schedule property describing the measurement of the said suit property/room, which has not been challenged/denied by the petitioner/defendant either in their written statement or in the

application filed under Order 39 Rule 7 of the Code. Merely by making an averement in the written statement about taking measurement cannot ipso facto gives the defendant/petitioner his entitlement to maintain application under Order 39 Rule 7 C.P.C.

17. In view of the above fact, the said decision is not applicable to the facts in the instant case.
18. In the decision of *Santosh Kumar Saha (supra)* as relied upon by the learned advocate for the petitioner, the suit was for declaration of easement in respect of a particular portion marked as "B" and "C" Schedule property and there is no prayer for declaration of any right, title or interest in respect of such portion of the suit property.
19. It was held that it was not the case of the plaintiff that he seeks any declaratory decree or claims any right, title and interest in any portion of the suit property. That being so, the question of measurement of the plots by a Survey Passed *ex parte* appears to be totally uncalled for and unnecessary. In the said case, the application was filed under Order 26 Rule 9 of the C.P.C. The said facts and circumstances is very different than that of the instant case.
20. In the last case relied upon in the case of *Amar Singh Saini (supra)* it was held that "it is well-settled that to prove that the plaintiffs are not in possession of any reasonable suitable

accommodation, it would be necessary to find out the extent of present accommodation of the plaintiff by local inspection. Therefore, I do not find that the learned Judge has in any way acted illegally and with material irregularity in exercise of his jurisdiction in allowing the application for local inspection filed by the plaintiff/opposite parties.”

21. In the instant case, the application has been taken out by the defendant when he had the opportunity to deny the contention of the plaintiff and also to establish his own case by adducing evidence as and when the stage so reaches. It has come to the knowledge of this Court that the stage of the suit has come to taking evidence of DW and, therefore, the defendant is not at all remediless and will have ample opportunity to establish his own in order to substantiate his own case.
22. In view of the above discussion, I do not find any merit in the present revisional application and hence stands rejected.
23. No costs.
24. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(CHAITALI CHATTERJEE (DAS), J.)