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

C.O. 3 of 2025

Deo Prakash Lepcha

-VS-

Sangwang Dukpa @ Paul Dukpa & anr.

Mr. Hasang Bhutia
Mr. Debajit Kundu
... for the petitioner

Affidavit of service filed on behalf of the petitioner
is taken on record.

This civil revision is filed by the petitioner-plaintiff
for setting aside order no.6 dated 17th December, 2024
passed in Title Suit No.2 of 2024 by the learned Civil
Judge (Senior Division) at Kurseong, District Darjeeling
rejecting the prayer of the petitioner-plaintiff for local
investigation under Order XXVI Rule 9 of the Code of
Civil Procedure, 1908 (hereinafter referred to as 'the
Code').

The brief fact of the case is that the petitioner-
plaintiff filed a suit for declaration, delivery of *khas*
possession of Schedule 'C' property, injunction and
other reliefs being Title Suit No.2 of 2024 before the
learned Civil Judge (Senior Division), at Kurseong. In
the said suit, the petitioner- plaintiff filed an application

under Order XXVI Rule 9 of the Code. Upon hearing both the parties, the learned trial Court rejected the prayer for holding local investigation commission. Hence, this revision.

Mr. Hasang Bhutia, learned Advocate appearing on behalf of the petitioner-plaintiff submits that the plaintiff in the suit has sought for declaration that he is the absolute owner in respect of the 'A' schedule property, a decree granting demarcation of northern boundary of the schedule 'A' property by way of survey commission. The defendants have installed bamboo fence and water tank in the 'C' schedule property and the plaintiff has sought for removal of encroachment and delivery of *khas* possession of the 'C' schedule property. The prayer for local investigation made by the petitioner-plaintiff is innocuous one since for determination of the area of 'A' schedule property and the encroached portion, that is, the 'C' schedule property by the defendants that is the only recourse. Learned trial court rejected the application for local investigation since the sale deed recorded the boundary of the 'A' schedule property and that the plaintiff by way of such application is trying to fish out evidence. However, it failed to appreciate that for proper adjudication of the issues raised by the plaintiff in his suit, local investigation commission is very much

required. He also draws the attention of the Court to the fact that the defendants in the suit, conceded to the prayer of the plaintiff for holding local investigation commission. In support of his contention, he relies on the decision of this Court passed in *Sri Ananda Chandra Paul -versus- Santosh Roy & ors. (C.O. 165 of 2023)*. He seeks for appropriate order.

Upon perusal of the order impugned it is found that the learned trial court has rejected the application for local investigation holding that there is no need to determine boundary of the 'B' schedule property as it is mentioned in the sale deed of the plaintiff. Further the plaintiff is to prove his pleadings of dispossession. Moreover, the plaintiff is trying to fish out the evidence and drag the proceeding of the suit.

It is found from the affidavit of service that the consignment/notice sent to the defendants-opposite parties is returned with postal endorsement '*refused*'. Such refusal amounts to good service.

In order to appreciate the arguments advanced on behalf of the petitioner-plaintiff it would be profitable to reproduce the relevant provisions under Order XXVI Rule 9 of the Code as hereunder:

“9. Commission 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.”

The provisions as aforesaid 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 such person as it thinks fit directing him to make such investigation.

In the present case at hand there is dispute with regard to encroachment made by the defendant in schedule ‘C’ property. Therefore, in order to ascertain the aforesaid aspect the only recourse is to direct for local investigation commission.

Such being the position, the contention of the learned trial Court of fishing out evidence and dragging the proceeding does not hold good.

In ***Shreepat versus Rajendra Prasad & Ors.*** reported in **2000 (3) ICC 728**, 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.”

In ***Haryana Waqf Board versus Shanti Sarup and Others*** reported in **(2008) 8 SCC 671**, 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.”

In ***Sultan Ahmed Mullick & Anr. Versus Mehraj Mullick*** reported in **(2012) 1 WBLR (Cal) 67**, 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."

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.

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. Thus, fishing out evidence 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.

In view of the above discussion, the civil revision being **C.O. 3 of 2025** stands allowed. The order no.6 dated 17th December, 2024 passed in Title Suit No.2 of 2024 by the learned Civil Judge (Senior Division) at Kurseong, District Darjeeling rejecting the prayer of the petitioner-plaintiff for local investigation under Order XXVI Rule 9 of the Code is set aside.

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.

There shall be no order as to costs.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

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

(**Bivas Pattanayak, J.**)