

(2010) 05 CAL CK 0073
In the Calcutta High Court
Case No : C.O. No. 804 of 2010

Sisir Saha and Others

APPELLANT

Vs

Baby Begum @ Mehera Begum and Another

RESPONDENT

Date of Decision : 12-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 7
Constitution of India, 1950 — Article 227

Citation : (2010) 4 CALLT 23 : (2011) 1 CHN 727

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Hironmoy Bhattacharyya and Debasish De, for the Appellant;

Judgement

Debasish Kar Gupta, J.—This revisional application is directed against Order No. 8 dated February 8, 2010 passed by the learned Civil Judge (Junior Division), 1st Court at Howrah in Title Suit No. 160 of 2009. By virtue of the impugned order, the learned Court below rejected the application filed by the Petitioners/Defendants under Order 39 Rule 7 of the CPC for holding local inspection of the suit property.

2. The Plaintiffs/opposite parties filed the suit under reference for a declaration of his title over plot No. 670 as also for a permanent injunction against the Defendants restraining them from taking forcible possession thereupon by changing nature and character of the same. The Petitioners filed the aforesaid application for appointment of a Commissioner for local inspection with regard to the points mentioned herein below:

1. To draw a rough sketch map showing the existing public passage which runs on the north-eastern corner side of plot No. 670, to take and measurement of length and breadth of the said unfinished public passage over the dag No. i.e., alleged Dag No. 670.

2. To take measurement of length from pucca passage on the northern side from

Dag No. 670 to meet the village road and to take a note the distance of the Plaintiffs house and the existing public path.

To take any other local feature as may be pointed out at the time of Commissioner work.

3. By virtue of the impugned order the learned Court below rejected the application with the observation that the aforesaid points could be brought on record by way of adducing evidence by some other way.

4. It is submitted on behalf of the Petitioners that there was material illegality in rejecting the application and an interference of this Court is necessary to rectify culpable error. It is also submitted on behalf of the Petitioners that only way of ascertaining the existence of a public path on plot No. 670 is to take the length and breadth of the same together with measurement of pucca passage on the northern side from Dag No. 670 to meet the village road. It is also submitted on their behalf that any objection with regard to the report to be submitted by the Commissioner may be considered by the Court at a later stage.

5. Reliance is placed on behalf of the Petitioners on the decisions of *Mina Dasi v. Gouri Sankar Guha* reported in 1976 (1) CLJ 640 and *Bihar State Subordinate Industries Field Officers' Association v. Kapil Deo Prosad Singh* reported in 2006 (6) SCC 506 in support of the above submissions.

6. It is submitted on behalf of the Plaintiffs/opposite parties that the existence of the path way on plot No. 670 can be proved by way of adducing evidence. The report of the local commission may create further confusion with regard to the disputed question of facts and existence of a path way on the plot of land in question.

7. Reliance is placed on the decision of *The Institution of Engineers (India) and Another Vs. Bishnu Pada Bag and Another*, , in support of the submissions made on behalf of the opposite parties.

8. I have heard learned Counsel appearing for the respective parties and I have also taken into consideration the facts and circumstances of this case. Admittedly, the subject matter involved in the suit under reference was existence of public path over plot No. 670 as a continuation of that path of plot No. 669. The opposite parties claimed non existence of the aforesaid public path on plot No. 670 while admitting the existence of that path on plot No. 669. On the other hand, the Petitioners also admitted the existence of a public path on plot No. 669 as also claimed continuation of that path over plot No. 670. As a result the application under Order 39 Rule 7 was filed by the Defendants for actual measurement of the length and breadth of the public path for the purpose of enabling the Court to arrive at a conclusion with regard to existence of that path on plot No. 670.

9. By way of rejecting the application under reference the learned Court below wrongfully directed the Petitioners to proof the case by way of adducing evidence

with regard to the existence of a public path on the plot of land in question which can only be ascertained by way of taking measurement of the plot of land in question and the plot adjacent thereto.

10. Needless to point out that the opposite parties are always at liberty to challenge the report of a local commission before the learned Court below if the occasion so arises.

11. It is the settled principles of law that the Court can interfere with an order passed in connection with the suit in course of judicial review to deal with an application filed under Article 227 of the Constitution of India for rectifying the culpable error in wrongful rejection for an application filed by a party to the suit. Reference may be made to the decision of *Mina Dasi* (supra).

12. 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.

13. With the above observations, the impugned order is set aside. The learned Court below is directed to dispose of the above application of the Petitioners/Defendants in the light of the observations made hereinabove expeditiously and preferably within four weeks from the next date of hearing i of the suit.

14. This revisional application is disposed of.

15. There will be, however, no order as to costs.

16. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.