

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

Present:

The Hon'ble Justice Biswaroop Chowdhury

**C.O. 3015 of 2023
Chittaranjan Sardar**

VERSUS

Biswanath Sardar & Ors.

For the petitioner: Mr. Pinaki Ranjan Mitra, Adv.
For the opposite party nos. 1: Mr. Mrinal Saha, Adv.
For the Respondent No.5: Mr. Debanjan Mukherjee, Adv.

Last Heard on: February 14, 2025

Judgment on: February 28, 2025

Biswaroop Chowdhury,J:

The petitioner before this Court is a plaintiff in a suit for declaration and permanent injunction and is aggrieved by the order dated 06.01.2023 passed by Learned Civil Judge Junior Division Fifth Court Howrah in Title Suit no 149 of 2007. The petitioner being aggrieved by the order of Learned Trial Judge in

dismissing application under Order 26 Rule 10A of the Code Of Civil Procedure has come up with this application under Article 227 of the Constitution of India.

The case of the petitioner in the application under Order 26 Rule 10A of the Code of Civil Procedure before Learned Trial Court may be summed up thus;

1. The dispute in controversy as well as that of the claim of the plaintiff is relating to easementary right over a common passage as mentioned in Schedule B of the plaint.
2. The defendant no-1 has illegally and forcefully constructed his pucca room with brick built wall by encroaching the 'B' Schedule Common passage.
3. The electric line of CESC Limited has passed through the said 'B' Schedule common passage to the premises of the plaintiff within 'A' Schedule property. The defendant no-1 has illegally and forcefully constructed the brick built wall over the said electric line of CESC Limited and thus encroached the said common passage to some extent. Therefore the said electric line of CESC Limited is lying

underneath the said pucca brick built wall on the northern side of the room of the defendant no-1.

4. That it is required to appoint a scientific investigation commissioner and permission be given to him to dig the earth, with the help of labourers and to ascertain as to whether there is existence of underground electric line of CESC Limited, underneath the northern side brick built wall of the room of the defendant no-1.

SCHEDULE.

- i. To draw a rough sketch map of the 'B' Schedule common passage alongwith CESC underground electric line of plaintiff.
- ii. To ascertain and note down the existence of CESC Limited underground electric line of plaintiff underneath the brick built northern side wall of the room of the defendant no-1 by engaging labour and digging earth.

The application was contested by the Defendant/opposite party no-1. By order dated 06/01/2023 Learned Trial court was pleased to pass an

Order dismissing the application under Order 26 Rule 10A by observing as follows:

‘It is the contention of the applicant/plaintiff that the defendant has raised construction by illegally encroaching upon the B scheduled suit property which is a common passage and raised a room with pucca wall thereon. Underneath the same runs the electric lines to the A scheduled property and therefore prays for appointment of scientific investigation commissioner leave to dig the earth northern side brick wall of the defendant to ascertain the existence of electric lines of CESC LTD.

Although the defendant failed to contest the instant application the OP by filing the written objection against the instant application on 18.05.2018 had raised vehement objection to the prayer of the applicant on the ground that the fact of encroachment has not been sufficiently proved, the room has been constructed over land belonging to the defendant, CESC Ltd has not been made a party and the instant prayer is beyond the

purview of this suit and therefore at this stage the instant prayer cannot be allowed.

Perused the record and the instant application. On careful perusal of the same, this Court is of the opinion that the fact of encroachment has not yet been established there is nothing on record to conclude that the preponderance of probability shows that the defendant has encroached schedule B property at this stage. A direction of Court to dig up underneath the room without adjudicating whether the same has been constructed by illegal encroachment or not will not be prudent. Moreover allowing such prayer will result in fishing of evidence by which the plaintiff/appellant intends to prove encroachment which cannot be allowed and the allegation of encroachment can be proved by the plaintiff at the time of trial by adducing evidence since the suit is already at PM stage.

Therefore this Court finds no merit in the instant application at this stage and is of the considered view that it is liable to be dismissed.

Hence

It is

ORDERED.

That the application filed by the plaintiff dated 06.11.2007 u/o 26 r 10A CPC is considered and dismissed ex-parte. There shall however be no order as to costs.'

The petitioner being aggrieved by the order dated 06-01-2023 passed by the Learned Trial Judge has come up with the application under Article 227 of the Constitution of India.

It is the contention of the petitioner that the Learned Judge acted illegally and with material irregularity in rejecting the application of the petitioner by holding that order allowing appointment of scientific Commissioner will result in fishing out evidence. It is further contended that appointment of scientific Investigation Commissioner is necessary to elucidate the matter in dispute and the Learned Judge acted illegally with material irregularity in rejecting the application. It is

also contended that the Learned Judge proceeded on the wrong footing by holding that CESC is not party to the suit who can also enlighten the Court.

Pursuant to filing of the application notice was issued to the opposite parties. Opposite party no-1 and 5 appeared and contested the case. Service of other opposite parties is dispensed with.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party no. 1, and opposite party no-5. Perused the petition filed and the materials on record.

Learned Advocate for the petitioner submits that the Learned Trial Court failed to appreciate the nature of dispute and dismissed the petition for appointment of commissioner. Learned Advocate for the opposite party no-1 submits that the Learned Trial Court rightly rejected the prayer for appointment of Commissioner as such appointment will amount to fishing out evidence. Learned Advocate for opposite party-no-5 submits that allowing prayer for appointment of commissioner will lead to

digging up of road which is not necessary in this case. Now in order to decide the material in issue it is necessary to consider the provisions contained in Rule 9, and Rule 10A of Order XXVI of the Code of Civil Procedure.

Rule 9 of Order XXVI CPC provides as follows:

Rule 9 - Commissions 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.

Rule 10A provides as follows:

10A Commission for scientific investigation -

1) Where any question arising in a suit involves any scientific investigation which cannot in the opinion of the Court be conveniently conducted before the Court the

Court may if it thinks it necessary or expedient in the interest of justice so to do issue a Commission to such person as it thinks fit, directing him to enquire into such question and report thereon to the Court.

2) The provisions of rule 10 of this Order shall as far as may be apply in relation to a Commissioner appointed under rule-9.

In the case of Gurdial Singh and Anr VS Avtar Singh and ors reported in AIR 2009 P and H. 164 the Hon'ble Court observed as follows:

'Learned counsel for the petitioner submits that even RW3 had admitted that he had no objection to the appointment of a Commissioner and after all, the landlord could not be expected to be interested in delaying his own proceedings. It was the contention on behalf of the learned counsel for the petitioner that no serious prejudice would be caused to the tenant by ascertainment of aged condition of the building. The counsel for the respondent joins issues by reference to the judgment of this Court in Pritam Singh and another

V. Sunder Lal and others, 1990 (2) PLR 191, where the Division Bench held that decision refusing to appoint a Local Commissioner does not decide any issue nor adjudicate the rights of the parties for the purpose of suit and hence such an order is not revisable under Section 115 of the Code of Civil Procedure. This judgment in my respectful view, has no bearing to a revision field under Section 15 of the Punjab Rent Restriction Act for the powers of the High Court in revision under Section 15 are wider than the powers of the Civil Court exercising powers under Section 115 of the Code of Civil Procedure. The aged condition of the building and the ascertainment of habitability are definitely matters of evidence where the report of the Local Commissioner will play significant role in obtaining scientific tones to render a just decision. If there had been a delay by the landlord in moving the application, there should have been a ground to visit the party guilty of laches with costs payable to the opposite party and not deny the evidence that could be collected by such a report.'

In the case of Balia Ram V Mola Ram and Another reported in AIR-2003 Himachal Pradesh P-87, the Hon'ble Court observed as follows:

'13. Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of

these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case.'

In the case of **Chatter Singh Vs Dina Nath** reported in AIR 2010 H.P the Hon'ble Court observed as follows:

'The learned counsel for the appellants has relied Bali Ram v. Mela Ram, 2002 (3) Shim LC 131 : (AIR 2003 HP 87) and Udai Ram v Ram Lal, Latest HLJ 2008 (HP) 296, on the point that in the given situation the learned lower appellate Court should have appointed the Local Commissioner to carry out the demarcation of khasra No. 69/16 to find out the encroachment made by the respondent on that khasra number.

In the present case, there is a boundary dispute. The appellants have done whatever they could do for carrying out the demarcation of the land, but for their bad luck demarcation was not carried out in accordance with law. In these circumstances, and more particularly in view of Bali Ram and Udai Ram (supra) , the learned

lower appellate court has erred in not appointing the Local Commissioner to carry out the demarcation to find out the encroachment, if any, made by the respondent on land comprised in khasra No. 69/16. In these circumstances, the application, dated 28-12-1994, of appellants filed by them , under Order 26, Rule 9 read with Section 151, CPC, in the learned lower appellate court is allowed. The substantial question of law No.1 is accordingly decided in favour of the appellants and against the respondent.'

In the case of **Yash Pal Vs Kartar Singh** reported in AIR 2003 P and H P 344 the Hon'ble Court observed as follows:

'5. A perusal of the aforementioned provision shows that a discretion has been vested in the Civil Court to get any scientific investigation conducted only if it thinks necessary or expedient in the interest of justice. The basic rationale of the provision is that if the opinion of the scientific investigation is going to help in extracting the truth and determining the controversy raised in the dispute before the

Court then such an investigation could be permitted. However, in the present case, such investigation is not likely to help to conclusively prove that the writing dated 11-2-1998 was infact recorded earlier because the age of the ink cannot be determined on the basis of the writing. If the ink is manufactured five years before the date of the execution of the document and used on 11-2-1998 for the first time then instead of resolving any controversy it would create confusion. Therefore, no useful purpose could be served by allowing such an application. It is true that opinion of expert is relevant under Sections 45 and 46 of the Indian Evidence Act, 1872 but in the present case that has to be read with Order 26. Rule 10A of the Code. The basic rationale is whether such scientific investigation is going to advance the cause of Justice and would be necessary for adjudicating upon the rights of the parties. Therefore, I do not find any ground to interfere in the well reasoned order passed by the learned Civil Judge. The revision petition does not disclose any irregularity or

illegality warranting interference of this Court in exercise of its jurisdiction under Section 115 of the Code.’

Thus upon considering the provisions contained in Rule 9, and Rule 10A of Order XXVI of the code of civil procedure and different judicial decisions it will appear that although the object of appointment of local investigation and scientific investigation is not to collect evidence but where the nature of evidence is such that it has to be obtained from the spot or where it cannot be obtained without scientific investigation courts are not powerless to appoint commissioner for local investigation or scientific investigation to elucidate the matter in dispute.

In the instant matter the petitioner/ plaintiff applied for appointment of commissioner for the purpose of scientific investigation to ascertain as to whether there is electric line underneath the brick built northern side wall of the room of the defendant no-1 as contended by the plaintiff which the plaintiff claims as common passage and the allegation against defendant no-1/ opposite party no-1 is that he encroached the common passage. The Learned Court below

while disposing the application of the petitioner/plaintiff under Order XXVI Rule 10A CPC did not address on the point whether the appointment of commission is necessary for the purpose of elucidating the matter in dispute, or whether evidence of existence of electric line underneath is necessary or not or if necessary it can be obtained without local investigation or not, and whether the suit involves any scientific investigation which cannot be conveniently conducted before court.

In the instant matter the Learned Trial Court simply rejected the application on the ground that plaintiff/petitioner could not sufficiently prove that defendant no-1 encroached the common passage, when the same can be proved only after Trial by adducing evidence. Learned Judge further went on to observe that CESC is not a party in the suit when District Engineer CESC Ltd is a party. Thus the Order cannot be sustained and the same should be set aside.

Hence this revisional application stand allowed. Order dated 06-01-2023 passed by Learned Civil Judge Junior

Division Fifth Court Howrah in Title Suit no-149 of 2017 is set aside. The application under Order XXVI Rule 10A of the Code of Civil Procedure is remitted to the Learned Trial Court to reconsider the same in accordance with law after hearing the opposite parties/defendants including District Engineer CESC opposite party no-5 Limited opposite party no-5 may file application to submit written statement before Learned Trial Court which may be considered in accordance with law.

It is made clear that this Court has not entered into the merits of the suit and all points are kept open.

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)