

Order No.33 dated 24.03.2023:

Today is fixed for hearing of application under Order 26 Rule 9 read with Section 151 CPC filed by the appellants.

Both parties file hazira.

Learned Advocate for the appellants submitted that the respondents made construction over the encroaching land of the appellants which was left as pathway and without local investigation such encroaching cannot be ascertained. He further submitted that local investigation commission can be allowed by appellate Court as this Court is the last Court of fact. Ld. Advocate relied on decisions in Sri Subhas Mondal & Anr. v. Sri Manoranjan Samanta & Anr. 2016(1) Cal. C.H.N. 673 and Haryana Waqf Board v. Shanti Sarup & Ors. 2008(8) SCC 671.

Ld. Advocate for the respondents submitted that there is no scope in appeal to entertain application under Order 26 Rule 9 CPC. No case of encroachment was made out in plaint so the question of appointment of investigation commissioner does not arise. There is no dispute of demarcation. The decisions relied on by the appellate are not applicable in this case.

Perused the application under Order 26 Rule 9 CPC, objection thereto and the materials on record. Considered.

Appellants as plaintiffs filed the suit for declaration and injunction. It was the case of the plaintiffs that 03 decimals land of LR Dag No. 109 and 03 decimals land of LR Dag No.113 belongs to them and proforma defendant and the defendants are owners of adjacent land. The plaintiffs alleged that the defendants are creating trouble by making construction over passage space left by the plaintiffs from their own land. It is undisputed that the land of the defendants are adjacent to the land of the plaintiffs and proforma defendant. Plaintiff has alleged encroachment by the defendants over their land which was left by them as pathway. Ld. Trial Court dismissed the suit on contest. Ld. Trial Court observed that there is no specification of such passage either in the plaint or in the sketch map and no inspection commission was done. From the averments of the plaint, it is clear that it is a case of encroachment of land of the plaintiffs. For adjudication of dispute of such nature, investigation commission is absolutely necessary. But the plaintiffs failed to pray for investigation commission before the Ld. Trial Court. The only controversy between the parties was regarding demarcation of the suit land of the plaintiffs because land of the defendants/respondents is adjacent to the suit land. In my opinion, the nature of dispute in the facts of the present case can be properly adjudicated by way of local investigation commission. So, appointment of investigation commissioner is necessary.

Hence,

ORDERED

That the application under Order 26 Rule 9 read with Section 151 CPC is allowed on contest without cost.

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Sri Kashi Nath Ghosh, Ld. Advocate and Surveyor is appointed as investigation commissioner to hold local investigation on the points mentioned in the application under Order 26 Rule 9 read with Section 151 CPC and to submit report.

The appellants are directed to deposit Rs.5,000/- as tentative cost and fees of commissioner and the appellants shall pay the final bill to be submitted by Ld. Commissioner.

The writ of commission shall be issued on deposit of Rs.5,000/- by the appellants.

Fix 17.05.2023 for payment of cost of Rs.5,000/- by the appellants.

Dict. & corr. By me.
Sd/- Sri. Shailendra Kumar Singh
Addl. District Judge, 2nd Court,
Serampore, Hooghly.

Sd/- Sri. Shailendra Kumar Singh
UID No. - WB665
Addl. District Judge, 2nd Court,
Serampore, Hooghly.