

**CIVIL REVISION**

Present: **The Hon'ble Justice Jyotirmay Bhattacharya**

*C.O. No.3035 of 2009*  
**Judgment On: 01-04-2010.**

**Gouranga Chandra Dey**  
**-Vs-**  
**Maya Ghosh & Anr.**

**POINTS:**

FURTHER INVESTIGATION -Plaintiff has been dispossessed subsequent to the submission of the earlier investigation report- The plaintiff filed an application for further investigation- Further investigation whether necessary for ascertaining the plaintiff's contention regarding his subsequent dispossession- Code of Civil Procedure, 1908 O26 R 9

**FACTS:**

The plaintiff initially filed a suit for injunction with a prayer for getting the suit property demarcated. The said property was demarcated by boundary wall on all four sides. It is alleged by the plaintiff that the plaintiff resides elsewhere and the defendant taking advantage of the plaintiff's absence encroached the suit property by removing the structure and boundary thereof and started digging earth from the land lying to the east of the suit property with a view to creating building thereon. Hence, a suit was filed. After filing the said suit an ad-interim order of injunction in the form of status quo was passed by the learned Trial Judge. The plaintiff's prayer for local investigation was rejected by the learned Trial Judge. The plaintiff is aggrieved by the said order. Hence, the instant application has been moved before this Court.

**HELD:**

The plaintiff filed an application under Order 26 Rule 9 of the Code of Civil Procedure before the learned Trial Judge for further investigation by a survey passed commissioner by alleging that the

plaintiff has been dispossessed from a part of the suit property by the defendants subsequent to the submission of the earlier investigation report by the Commissioner, this Court feels that further investigation is necessary for ascertaining the plaintiff's contention regarding his subsequent dispossession from a part of the suit property by the defendants. Para-15

For the Petitioner : Mr. Bidyut Kr. Banerjee,  
Mr. Tarak Nath Halder.

For the Opposite Parties : Mr. S.P. Roy Chowdhury,  
Mr. Jahar Lal De,  
Mr. Debasish Roy,  
Mr. Siddhartha Banerjee,  
Mr. Suchayan Banerjee.

**THE COURT:**

1) This application under Article 227 of the Constitution of India is directed against an order dated 7<sup>th</sup> July, 2009 passed by the learned Civil Judge (Junior Division), 3<sup>rd</sup> Court at Sealdah in Title Suit no.182 of 2004 by which the plaintiff's prayer for local investigation was rejected by the learned Trial Judge. The plaintiff is aggrieved by the said order. Hence, the instant application has been moved before this Court.

2) Heard Mr. Banerjee, learned Senior Counsel appearing for the petitioner and Mr. Roy Chowdhury learned Senior Counsel appearing for the opposite party. Considered the materials on record including the impugned order.

3) Let me now consider as to how far the learned Trial Judge was justified in passing the impugned order in the facts of the instant case.

4) The plaintiff initially filed a suit for injunction with a prayer for getting the suit property demarcated separating the same from the land in C.S. Khatian No.107. The plaintiff claims that the plaintiff became the owner of the suit property by virtue of his purchase from the erstwhile owner thereof vide deed of conveyance dated 7<sup>th</sup> November, 1987. The said property was demarcated by boundary wall in all four sides. The suit property which is identified by boundaries has been mentioned in the schedule of the plaint. It is alleged by the plaintiff that the plaintiff resides elsewhere and the defendant taking advantage of the plaintiff's absence encroached the suit property by removing the structure and boundary thereof and started digging earth from the land in C.S. Khatian No.107 lying to the east of the suit property with a view to creating building thereon. Hence, the said suit was filed.

5) After filing the said suit an ad-interim order of injunction in the form of status quo was passed by the learned Trial Judge on the petitioner's application for temporary injunction vide Order No.52 dated 31<sup>st</sup> March, 2002. Subsequently, in connection with the said injunction proceeding an investigation was directed by this Hon'ble Court by an order passed in C.O. No.422 of 2005 whereby a survey passed advocate commissioner was appointed with a direction for submission of a report with regard to identification of the suit property by relayment of the land purchased by the plaintiff by the deed of conveyance dated 7<sup>th</sup> November, 1987 with reference to the boundaries thereof.

6) Accordingly, an investigation was made by the survey passed advocate commissioner in the presence of both the parties and a report was submitted by him on 25<sup>th</sup> October, 2005 indicating therein that :-

“The total land area of ‘E’ plot in occupation of the plaintiff is more than 1 cottah 4 chittak 0 sq. ft. and it is actually 650 sq. ft. more i.e. 14 chittak 20 sq. ft. and such total area of ‘E’ plot is 2 cottahs 2 chittaks 20 sq. ft. The plaintiff’s occupied portion is shown by red border line and the plot ‘E’ has been shown by green border line.

It transpires from the above fact that there is no encroachment in the plaintiff’s ‘E’ plot of land by the defendant.”

7) The said report was accepted by the Court and none of the parties raised any objections against the said report. Thus, the identity of the suit property can be established with reference to the said report.

8) Subsequently, the interim order of status quo which was passed by the learned Trial Judge was vacated by the learned Trial Judge on 31<sup>st</sup> March, 2006 vide order No.52. It was alleged by the plaintiff that taking advantage of the said order, the defendant encroached upon the suit property and thus, virtually the plaintiff was dispossessed from a part of the suit property which was encroached by the defendant.

9) Under such circumstances, the plaintiff amended his plaint by incorporating therein the factum of such encroachment and prayed for a decree for recovery of such encroached portion of the suit property.

10) It may also be noted herein that the plaintiff filed an appeal against the order by which the ad-interim order of injunction was passed by the learned Trial Judge, before the Appeal Court and the learned Appeal Court by his order dated 10<sup>th</sup> November, 2006 again passed an order directing the parties to maintain status quo. The said order is under challenge in another revisional application being C.O. No.4572 of 2006, at the instance of the defendant/opposite party herein. The said revisional application is still pending before this Court. Pursuant to an order passed by the Court on 15<sup>th</sup> October, 2007 in the said revisional application, a learned Advocate of this Court was appointed as Special Officer for submission of his report after holding inspection at the locale after ascertaining the present position of the construction and also after ascertaining as to whether there is any apparent encroachment on the land of the plaintiff by any construction allegedly raised by the defendants.

11) A report was submitted by learned Special Officer in the said revisional application. On perusal of the said report, this Court finds that no definite conclusion could be arrived at by the learned Special Officer with regard to the points for inspection as the plaintiff did not co-operate with the learned Special Officer in course of inspection.

12) Thus, this Court holds that this inspection report is of no help for the Court to decide the dispute regarding encroachment.

13) But fact remains that even this Hon'ble Court also felt the necessity for ascertainment of such disputed question regarding such encroachment by way of inspection.

14) In my view, such disputed question regarding encroachment cannot be ascertained by local inspection, as ascertainment of such dispute requires investigation.

15) When under such circumstances the plaintiff filed an application under Order 26 Rule 9 of the Code of Civil Procedure before the learned Trial Judge for further investigation by a survey passed commissioner by alleging that the plaintiff has been dispossessed from a part of the suit property by the defendants subsequent to the submission of the earlier investigation report by the Commissioner, this Court feels that further investigation is necessary for ascertaining the plaintiff's contention regarding his subsequent dispossession from a part of the suit property by the defendants. Accordingly, this Court holds that the impugned order cannot be retained. The impugned order, thus, stands set aside.

16) The learned Trial Judge is, thus, directed to issue a writ of commission to the said learned Advocate Commissioner who held the investigation earlier with a direction upon him to survey the suit property once again in the same process as it was done earlier but with reference to his report dated 25<sup>th</sup> October, 2005 for ascertaining as to whether the defendant has encroached any part of the suit property or not and if it is found that the defendant encroached any part of the suit property then to report as to which part of the suit property has been encroached by the defendant and extent of such encroachment made by the defendants with clear identification of such encroachment to be

shown in the map to be prepared by him. Such investigation should be completed within three months from the date of issuance of the writ of commission by the learned Trial Court and the parties are directed to give all cooperation to the learned Commissioner in the process of such investigation.

17) The revisional application, thus, stands allowed.

18) Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.

*( Jyotirmay Bhattacharya, J. )*