

(2025) 01 JH CK 0108

Jharkhand High Court

Case No: C.M.P. No. 1309 Of 2023

Manoj Kumar Khatri @ Manoj
Khatri

APPELLANT

Vs

Kumar Rohit Singh

RESPONDENT

Date of Decision: Jan. 20, 2025

Acts Referred:

- Constitution of India, 1950 - Article 227
- Code of Civil Procedure, 1908 - Section 151, Order 26 Rule 9, Order 26 Rule 910, Order 26 Rule 10A

Hon'ble Judges: Sanjay Kumar Dwivedi, J

Bench: Single Bench

Advocate: P.A.S. Pati

Final Decision: Dismissed

Judgement

Sanjay Kumar Dwivedi, J

1. Heard the learned counsel appearing on behalf of the petitioners.
2. This petition has been filed under Article 227 of the Constitution of India.
3. The prayer in this petition has been made for quashing of the order dated 23.09.2023 whereby the petition filed under Order XXVI Rule 10-A CPC read with Section 151 of CPC seeking appointment of the pleader commissioner has been rejected by the learned court in Original Suit (T.S.) No.91 of 2009. The further prayer is made to allow the petition under Order XXVI Rule 10-A CPC.
4. Mr. P.A.S. Pati, the learned counsel appearing on behalf of the petitioners submits that the petitioners are defendant nos.2 and 3 in the Original Suit

(TS) No.91 of 2019 and respondent no.1 is plaintiff and proforma respondent no.2 is defendant in the said title suit. He further submits that the said suit was instituted for decree of recovery possession of the suit premises described in the scheduled and for evicting the defendant therefrom. He submits that after filing of the written statement the petitioner /defendant nos.2 and 3 have filed a petition under Order XXVI Rule 10-A CPC read with Section 151 of CPC with a prayer that a competent commissioner be appointed to certify the age and size of the house structure standing in the suit holding that on the date of filing of the suit after scientific investigation of the suit held that the house structures standing thereon holding the age thereof. The learned counsel submits that the learned court has rejected the said petition and not appointed the pleader commissioner and the spirit of the Order XXVI Rule 10-A CPC is not interpreted correctly by the learned court. He relied in the case of *Orf ama Avatar Soni v. Mahanta Laxmidhar Das and Others* reported in (2019) 11 SCC 415 and further relied in the case of *Committee of Management, Anjuman Intezamia Masjid, Varanasi (Gyanvapi Mosque Committee) v. Rakhi Singh and Others*, reported in (2024) 3 SCC 336. Relying on the above judgments, he submits that the case of the petitioners is fully covered. He further submits that in the issue of property the pleader commissioner is required to be appointed.

5. It is an admitted position that the suit was instituted for decree of recovery and possession of the suit premises described in the scheduled and for evicting the defendant therefrom. In this background, the petition under Order XXVI Rule 10-A CPC was filed. The learned court after recording the argument of both the sides have come to the conclusion that the suit was instituted for decree of possession by evicting the defendants from the scheduled property and the entire claim was based on a sale deed and the learned court has come to the conclusion in view that no money is being claimed for the construction area. Thus, it is crystal clear that if the sale deed is the subject matter of the suit the area is already described in the sale deed and both the sides are knowing the area and inspite of that, the petition under Order XXVI Rule 9 and 10 CPC was filed. The Order XXVI Rule 9 and 10 CPC speaks as under:

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:

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. 10

10. Procedure of Commissioner. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person. "The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

6. In terms of the Order XXVI Rule 10 CPC the commissioner has to submit a report in writing to the learned court. The report of the commissioner and the evidence taken by him, constitute evidence in the suit and form the part of the record. However, with the permission of the court, may examine the Commissioner personally in open court touching any of the matters of the report. The evidentiary value of any report of the commissioner is a matter to be tested in the suit. It is open to the objections including the cross objections.

7. It is further well settled that the object of local investigation by appointing commissioner is not to collect evidence which can be adduced in the court. It is the court who has to decide the matter on the basis of the evidence to be adduced by the parties or the evidences already on record. A

reference may be made to the case of Praga Tools Corpn. Ltd. v. Mahboobunnissa Begum, reported in (2001) 6 SCC 238 wherein, at paragraph

No.12, it has been held as under:

“12. The State of Andhra Pradesh has filed objections to the findings of the trial court. On behalf of the appellants and the State of Andhra Pradesh it was submitted that the trial court could not have discarded the findings of the Court Commissioner. It was submitted that as per the orders of this Court, it was only this Court which could hear objections on the report of the Commissioner. We see no substance in this submission. This Court had directed the trial court to record findings. The trial court may have appointed a Commissioner to carry out survey but ultimately the findings had to be recorded by the trial court. The report of the Commissioner could only be an aid to the trial court in arriving at its findings. The trial court has allowed parties to lead oral as well as documentary evidence. The trial court has complied with the directions of this Court.”

8. In light of the above for the purpose of getting report from survey knowing commissioner to find out the present physical possession and the land in dispute and to find out the actual state of affairs between the parties, the appointment of survey knowing commissioner for that purpose will not bound to collect the evidence rather it will elucidate any matter in dispute. Normally writ is to be issued to a commissioner for local investigation to appreciate the evidence already recorded. The commissioner can be appointed where it is to be found as to which plot the disputed land lies. A writ can be issued to any person to relay the same on the bench even through no evidence is required if the court finds that the parties themselves cannot produce the evidence to that effect. In the case in hand on the basis of the sale deed the suit was instituted meaning thereby both the parties are knowing the area of the suit property.

9. In the case relied by Mr. Pati, the learned counsel in the case of Committee of Management, Anjuman Intezamia Masajid, Varanasi (Gyanvapi Mosque Committee) v. Rakhi Singh and Others (supra) the Hon^{ble} Supreme Court at paragraph no.12.5 has held as under:

“12.5. While an order for conducting a scientific investigation or survey under Order 26 Rule 9 may be passed at any stage, ordinarily a scientific survey ought

not to be ordered until the court is cognizant of the issues that would arise in the suit.â€

10. Unless that stage has come in the trial the Order XXVI Rule 10A CPC cannot be allowed in a routine way. Thus, that judgment is not helping the petitioner.

11. In the case of Rama Avatar Soni v. Mahanta Laxmidhar Das and Others (supra) relied by Mr. Pati, the learned counsel that is on the issue of

WILL and ascertainment of the WILL property was necessary and in view of that the said case was allowed. The fact of the present case is

otherwise. As such, that case is also not helping the petitioner.

12. In view of the facts of the present case, no case of interference is made out. As such, C.M.P. No.1309 of 2023 is dismissed.